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8-10-45-

No. 10273

United States
Circuit Court of Appeals
For the Ninth Circuit. *VR*

—
JOSEPH DI MARZO,

2344
Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

—
Transcript of Record
—

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

AUG - 5 1943

PAUL P. O'BRIEN,
CLERK

No. 10273

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH DI MARZO,

Appellant,

vs.

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Transcript of Record

Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

MORRIS LAVINE, Esq.
620 Bartlett Bldg.
Los Angeles, Calif.

For Appellee:

LEO V. SILVERSTEIN,
United States Attorney
JAMES L. CRAWFORD and
NORMAN W. NEUKOM,
Assistants United States Attorneys
600 U. S. Post Office & Court House
Bldg.
Los Angeles, Calif. [1*]

At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 9th day of September in the year of our Lord one thousand nine hundred and Forty-two.

Present: The Honorable Peirson M. Hall, District Judge.

No. 15,500-PH Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH DI MARZO,

Defendant.

ORDER FOR FURTHER HEARING ON MOTIONS TO QUASH AND FOR A CONTINUANCE

This cause coming on for jury trial of defendant Joseph Di Marzo; James L. Crawford, and N. W. Neukom, Assistant U. S. Attorneys, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the said defendant, who is present; and Wm. J. White, Court Reporter, being present and reporting the proceedings:

Attorney Lavine moves that the jurors be excluded from the court room for the purpose of being heard on two motions. Attorney Neukom objects, and after roll call of the jury the pros-

pective jurors are ordered to absent themselves from the court room until 11:05 A.M.

Attorney Lavine reviews the case and the proceedings heretofore had in this court, and moves to quash, or in lieu thereof, for a continuance, which is objected to by Attorney Neukom.

At 11:04 A.M. the Court declares a fifteen minute recess and orders that all jurors appearing for impanelment be excused until 2 P.M., Sept. 10, 1942.

At 11:05 A.M. all prospective jurors return to the court room and are informed by the clerk to return on September 10, 1942, at 2 P.M., as heretofore ordered by the Court.

At 11:37 A.M. court reconvenes herein and all being present as before, it is ordered to proceed.

Attorney Neukom addresses the Court, stating that he has teletyped the Attorney General, a copy of which is ordered filed, and Attorney Neukom proceeds to argue to the Court in opposition to defendant's motions to quash and for a continuance.

The Court states that inasmuch as Judge Ling has passed upon the objections to the jurisdiction of the Court, it will only hear argument on motion [12] for a continuance and motion to quash.

Attorney Lavine objects further to the Court's proceeding with trial on the additional grounds that the defendant, being an alien enemy confined in an internment camp, the restrictions of which prohibit free consultation with counsel in preparation of the case for trial, and moves for a con-

tinuance for the duration of the war. Attorney Neukom objects.

Attorney Lavine now moves the Court to quash the Indictment, on the grounds that the Grand Jury, who returned the Indictment, was composed solely of men and that at no time has either the Grand Jury or the Petit Jury been composed of both men and women.

The Court, thereupon, orders that further hearing on the motions to quash and for a continuance be, and they hereby are, continued to 2 P.M. September 10, 1942, at which time the jurors will be present for proceedings on trial in lieu of a denial of said motions of defendant. [13]

At a stated term, to-wit: The February Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 10th day of September in the year of our Lord one thousand nine hundred and Forty-two.

Present: The Honorable Peirson M. Hall, District Judge.

No. 15,500-PH Crim.

[Title of Cause.]

ORDER DENYING MOTION TO QUASH AND
FOR CONTINUANCE

This cause coming on for further hearing on motions to quash and for a continuance and for

jury trial of defendant Joseph Di Marzo; James L. Crawford and Norman W. Neukom, Assistant U. S. Attorneys, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the said defendant, who is present; and Wm. J. White, Court Reporter, being present and reporting the proceedings, and counsel for the Government answering ready, and counsel for the defendant stating he is not ready to proceed with trial until the disposition of motions has been made, which are now before the Court; and at request of the Court,

Counsel approach the bench and, out of hearing of those in attendance upon the Court, including the prospective jurors called for impanelment herein, discuss the motions to quash and for a continuance, and also discuss the immunity of counsel for the defendant in connection with the Act of 1917 entitled, "Trading with the Enemy."

The Court orders motions to quash and for a continuance denied, with exceptions allowed counsel for the defendant. * * * [14]

At a stated term, to-wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 17th day of September in the year of our Lord one thousand nine hundred and Forty-two.

Present: The Honorable Peirson M. Hall, District Judge.

[Title of Cause.]

BEGINNING OF TRIAL

This cause coming on for further jury trial of defendant Joseph Di Marzo; James L. Crawford and Norman W. Neukom, Assistant U. S. Attorneys, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the said defendant, who is present; and Ferol M. Harvey, Court Reporter, being present and reporting the testimony and the proceedings, it is ordered to proceed.

Attorney Lavine argues to the Court in support of the defendant's plea of once in jeopardy citing authorities in support thereof. Attorney Neukom argues in opposition to the said plea of once in jeopardy citing authorities.

On motion of Attorney Lavine it is ordered that an order be entered herein nunc pro tunc as of August 8, 1942, and Attorney Neukom stipulates thereto that a plea of once in jeopardy is entered in Case No. 15,500-PH Crim. in behalf of defendant Di Marzo, based upon the fact that by virtue of the acquittal of Helen Beverlin in Case No. 15,499-H Crim.

- The Court now overrules the objections of Attorney Neukom to the defendant's introduction of evidence in his plea of once in jeopardy and thereupon allows counsel for defendant to present evidence in support of defendant's plea of once in jeopardy.

At 10:55 A.M. court recesses. At 11:08 A.M. Court reconvenes and all appearing as before, including the jury, counsel so stipulating, it is ordered to proceed.

Anthony Joyce is recalled to the stand and testifies on direct examination by Attorney Lavine in support of defendant's plea of once in jeopardy and, there being no cross-examination, the said witness is excused.

Attorney Lavine now presents evidence to the jury in support of the defendant's plea of once in jeopardy, reading the Indictment, No. 15,499-H Crim., and engrossed minutes pertaining thereto.

Lindscott Tyler, F.B.I. Agent, 4274 W. 1st. St., Los Angeles, California, is called, sworn, and testifies on direct examination by Attorney Lavine in support of defendant's plea of once in jeopardy.

At 12:11 P.M. court recesses until 2 P.M. At 2:05 P.M. court reconvenes herein and all being present as before, and the jury now being present, and counsel so stipulating, it is ordered to proceed.

Due to the absence of Witness Bradford, alias Beverlin, at 2:14 P.M. court recesses until 2:30 P.M. At 2:35 P.M. court reconvenes and all being present as before, including the jury, and counsel so stipulating, it is ordered to proceed.

Attorney Lavine moves for a continuance to hear further testimony of witness Beverlin and the said motion is denied pursuant to objection by Attorney Neukom. [15]

Attorney Lavine now moves to strike certain

testimony of Witnesses Marian Anderson, Joan Day, and Helen Merle Beverlin and the said motion is granted in part and denied in part.

Attorney Lavine moves to re-open the case for the purpose of hearing testimony of Witness Beverlin and the said motion is granted.

Helen Merle Beverlin resumes the stand and testifies on direct examination by Attorney Lavine in support of defendant's plea of once in jeopardy and on cross-examination by Attorney Neukom.

Counsel inform the Court that all witnesses may be permanently excused from further attendance herein and it is so ordered, and it is further ordered that the bond of Witnesses Beverlin be exonerated.

Attorney Lavine renews his motion for a directed verdict and the said motion is denied.

Attorney Neukom now moves the Court to strike all of testimony relative to defendant's plea of once in jeopardy and that it not be submitted to the jury and the said motion is denied.

At 3:50 P.M. court recesses. At 3:59 P.M. court reconvenes and all appearing as before, including the jury, and counsel so stipulating, it is ordered to proceed.

The Court now reads portions of the record and it is ordered that the said portions be stricken from the record and that the jury disregard the said portions.

Attorney Crawford makes opening argument to the jury in behalf of the Government.

At 4:40 P.M. the Court reminds the jury of the admonition heretofore given herein and orders that

further proceedings in this trial be, and they hereby are, continued to September 18, 1942, at 10 A.M. [16]

In the District Court of the United States,
Southern District of California, Central Division

No. 15,500-H-Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH DI MARZO,

Defendant.

VERDICT

We, the Jury in the above-entitled case, find the defendant, Joseph Di Marzo, Guilty as charged in the Indictment.

H. M. BURGESSON

Foreman of the Jury

Dated: Los Angeles, California, September 18, 1942.

[Endorsed]: Filed Sep 18 1942. [17]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled case, find for the (Government) on said defendant's plea of once in jeopardy.

H. M. BURGESSON

Foreman of the Jury

Dated: Los Angeles, California, September 18, 1942.

[Endorsed]: Filed Sep 18 1942. [18]

At a stated term, to-wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 28th day of September in the year of our Lord one thousand nine hundred and Forty-two.

Present: The Honorable Peirson M. Hall, District Judge.

No. 15,500-PH Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH DI MARZO,

Defendant.

ORDER DENYING MOTION FOR NEW TRIAL AND DENYING MOTION FOR ARREST OF JUDGMENT

This cause coming on for decision on motions of the defendant for a new trial and in an arrest of judgment, and for sentence of defendant Joseph Di Marzo; N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the said defendant, who is present; and Samuel Goldstein, Court Reporter, being present and reporting the testimony and the proceedings;

On motion of Attorney Lavine it is ordered that the Immigration Agent be called for an examination, and

Joseph P. Kettering is recalled to the stand and testifies on direct examination by Attorney Lavine in support of motion of defendant that the Court has no jurisdiction; on cross-examination by Attorney Neukom; on re-direct examination by Attorney Lavine; on examination by the Court; on re-cross-examination by Attorney Neukom; and on further re-direct examination by Attorney Lavine.

The Court reviews the various points made by the defendant in support of his motion for a new trial and denies the said motion, and also denies motion in an arrest of judgment.

Attorney Lavine makes a statement in mitigation of defendant, and Attorney Neukom making no recommendations either for or against the defendant, and the defendant interposing no objections to being sentenced, the Court now pronounces sentence upon the defendant as follows: * * * [26]

District Court of the United States for the
Southern District of California, Central Division

No. 15,500-PH-Criminal¹

Indictment in one count for violation of U. S. C.,
Title 18, Sec. 398

UNITED STATES OF AMERICA

v.

JOSEPH DI MARZO

JUDGMENT AND COMMITMENT

On this 28th day of September, 1942, came the United States Attorney, and the defendant Joseph Di Marzo appearing in proper person, and by counsel, Morris Lavine, Esq.,² and,

The defendant having been convicted on³ a verdict of the jury of the offense charged in the¹ Indictment in the above-entitled cause, to wit⁴ transportation in interstate commerce of a certain woman with the intent and for the purpose of having said certain woman practice prostitution and debauchery and for other immoral purposes; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the⁵

penitentiary type to be designated by the Attorney General or his authorized representative for the period of⁶ three (3) years, and in addition thereto pay a fine into the United States of America in the sum of \$1,000.00, and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.⁷

It Is Further Ordered that⁸ the defendant be granted a five-day stay of execution of said sentence, the defendant remaining in the custody of the Immigration Department during said stay, and that at the expiration thereof the defendant be remanded to the custody of the United States Marshal for commitment.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.⁹

(Signed) PEIRSON M. HALL

United States District Judge.

A True Copy. Certified this day of

(Signed)

Clerk.

(By)

Deputy Clerk.

¹Indictment or information. ²Insert (a) "by counsel" or (b) "having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not," whichever is applicable. ³Insert the words "his plea of guilty," "plea of

nolo contendere," or "verdict of guilty," as the case may be. ⁴Name specific offense or offenses and specify counts upon which convicted. ⁵Insert type of institution such as "jail," "training school," "reformatory," "penitentiary," or "special." If prisoner's circumstances require special type institution, Marshall should submit facts and recommendations of Court to Attorney General where regulations do not apply. ⁶Insert sentence and any provision for payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence. ⁷Strike out if Court did not so order. ⁸Indicate any order with respect to suspension and probation. ⁹Certified copy to accompany defendant to institution.

[Endorsed]: Filed Sept. 28, 1942. [27]

[Title of District Court and Cause.]

STATEMENT OF MATTERS UPON WHICH
APPELLANT INTENDS TO RELY

Comes now the defendant and appellant, Joseph Di Marzo, and states that he will rely upon the evidence and record in the case as set forth in the bill of exceptions and the clerk's transcript, and all motions and points of law as set forth in each of the same, and upon the assignment of errors, and hereby adopts, as his respective points to be relied on in this appeal, all those set forth in the bill of exceptions and assignment of errors heretofore prepared and filed by him.

MORRIS LAVINE

Attorney for Defendant and
Appellant.

Received copy of the within Statement of Matters upon which Appellant intends to rely, this 30th day of December, 1942.

LEO V. SILVERSTEIN

United States Attorney

[Endorsed]: Filed Dec. 30, 1942. [32]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court of the United States, in and for the Southern District of California, Central Division:

You will please prepare the following record in the above-entitled cause for the Ninth Circuit Court of Appeals:

Clerk's Transcript as follows:

1. Indictment;
2. Minutes of July 29, 1942, relating to proceedings on arraignment and entry of plea, and rulings of the Court;
3. Objections of defendant Joseph Di Marzo to jurisdiction of the Court and affidavit of Joseph Di Marzo;
4. Minutes of August 8, 1942, relating to the hearing on objections of Joseph Di Marzo to jurisdiction of the Court, entry of plea, and rulings of the Court;
5. Minutes of September 9, 1942, relating to

proceedings on motion to quash and for continuance, and rulings of the Court;

6. Minutes of September 10, 1942, relating to proceedings and rulings on motion to quash and for a continuance;

7. Minutes of September 17, 1942, relating to proceedings and order in connection with the plea of once in jeopardy and motion for directed verdict and rulings thereon;

8. Verdicts of the jury;

9. Affidavit of Morris Lavine;

10. Objections to jurisdiction of the Court; [33]

11. Motion in arrest of judgment;

12. Motion for a new trial;

13. Minutes of September 28, 1942, relating to proceedings and rulings on motion for a new trial and motion in arrest of judgment and sentence of defendant;

14. Notice of appeal;

15. Affidavits and orders enlarging time within which to settle bill of exceptions;

16. Bill of exceptions;

17. This praecipe.

MORRIS LAVINE

Attorney for Defendant

Received copy of the within Praecipe this 30th day of December, 1942.

LEO V. SILVERSTEIN

United States Attorney

[Endorsed]: Filed Dec 30 1942. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 34 inclusive contain full, true and correct copies of: Indictment; Minute Order Entered July 29, 1942; Objection to the Jurisdiction of the Court; Affidavit of Joseph Di Marzo; Minute Order entered August 8, 1942; Minute Order entered September 9, 1942; Minute Order entered September 10, 1942; Minute Order entered September 17, 1942; Verdict; Verdict on plea of Once in Jeopardy; Affidavit of Morris Lavine; Objections to the Jurisdiction of the Court; Motion in Arrest of Judgment; Motion for a New Trial; Minute Order entered September 28, 1942; Judgment and Commitment; Notice of Appeal; Order; Statement of Matters upon which Appellant Intends to Rely and Praecipe which, together with the original Assignment of Errors and Bill of Exceptions transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$12.50 which amount has been paid to me by appellant.

Witness my hand and the seal of the said District Court this 2 day of February, A. D. 1943.

[Seal]

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Joseph Di Marzo, the appellant in the above-entitled cause, and says that in the record and proceedings prior to and during the trial of said cause in the District Court of the United States, error has intervened to his prejudice, and makes the following assignment of errors which he avers occurred prior to and during the trial of the cause; said errors, and each of them, are to the great detriment, prejudice and injury of the defendant and in violation of the rights conferred upon him by law and by the Constitution of the United States. Said errors are as follows:

I.

The District Court erred in its opinion, decision and determination in overruling objections to the jurisdiction of the Court to try the defendant while he was an interned alien Italian.

Said trial was in violation of the treaties and statutes made and provided for such persons so situated. [1]

II.

The District Court erred in its decision, opinion and determination overruling objections to the jurisdiction of the Court.

III.

The District Court erred in its decision, opinion and determination of defendant's objection that his constitutional rights under the Fifth Amendment to the Constitution of the United States were violated.

IV.

The District Court erred in its decision, opinion and determination overruling the objection that the defendant was to be tried in violation of rights guaranteed to him under the Sixth Amendment to the Constitution of the United States, entitling him to the right of counsel and to be adequately prepared in the presentation of his defense.

V.

The District Court erred in overruling the objections to the matter of selecting the grand jury, and in holding that such grand jury was constituted in accordance with the practice of the State of California, when women were excluded therefrom.

VI.

The District Court erred in overruling objections to the formation of the petit jury on the ground that women were excluded therefrom in this case.

VII.

The District Court erred in holding that the defendant was not formerly acquitted and was not once in jeopardy in this case by reason of the acquittal of Helen Merle Beverlin.

VIII.

The District Court erred in its decision and determination that the defendant was not a prisoner of war, subject to the provisions of the Hague Treaty, and in holding that the District Court was not bound by such provisions.

IX.

The District Court erred in holding that the defendant, constantly accompanied in the courtroom by an armed, uniformed guard of the Immigration Service, was or could be granted a fair and impartial trial under such circumstances, as guaranteed by the Fifth Amendment to the Constitution of the United States.

X.

The District Court erred in holding private communication with the jury while they were deliberating on the cause and in the absence of defendant and his counsel.

XI.

The District Court erred in failing to direct the verdict in favor of defendant both on the plea of not guilty and the plea of once in jeopardy. [3]

XII.

The verdict was contrary to the law and the evidence. The evidence was insufficient to support the verdict. The District Court erred in failing to direct a verdict of not guilty on these grounds.

XIII.

The District Court erred in submitting the facts to the jury and advising the jury to find for the Government on the plea of once in jeopardy. The District Court invaded the province of the jury.

XIV.

The District Court erred in the admission and exclusion of evidence throughout the trial of the case, to which exceptions were duly taken and noted, and particularly erred in the admission of testimony of other alleged acts and offenses by the defendant not within the allegations contained in the indictment.

XV.

The District Court erred in permitting examination by Government counsel of Emanuel Bernard Rosegarten. (Typewritten transcript pp. 68-85, incorporated herein by reference.)

XVI.

The prosecutor was guilty of prejudicial misconduct in his examination of Emanuel Bernard Rosegarten in the manner of cross-examination. [4]

XVII.

The District Court erred in excluding as evi-

dence the contents of the statement allegedly taken from the wife of Emanuel Bernard Rosegarten by a Government agent. (Typewritten transcript pp. 84, 85, incorporated herein by reference.)

XVIII.

The District Court erred in overruling the objections to the testimony of Joan Day. (Typewritten transcript pp. 87-89, incorporated herein by reference.)

XIX.

The District Court erred in the admission of testimony of David Goodsell. (Typewritten transcript, pp. 97-99, incorporated herein by reference.)

XX.

The District Court erred in admitting testimony of Helen Merle Beverlin regarding acts and transactions other than the one alleged in the indictment, particularly that in the typewritten transcript pp. 104, et seq., incorporated herein by reference.

XXI.

The District Court erred in the admission of transactions with reference to giving other girls money for any purpose, not alleged in the indictment. (Typewritten transcript pp. 119-122, incorporated herein by reference.) [5]

XXII.

The District Court erred in the admission in evidence, over objections, of the testimony of Joan

Day. (Typewritten transcript pp. 123-125, incorporated herein by reference.)

XXIII.

The District Court erred in the admission in evidence, over objections, of the testimony of Helen Merle Beverlin regarding Viola or Diane Stevens. (Typewritten transcript, pp. 125 et seq., incorporated herein by reference.)

XXIV.

The District Court erred in excluding the testimony of Helen Merle Beverlin on the Government's objections, on the cross-examination of Helen Merle Beverlin. (Typewritten transcript pp. 142-144, incorporated herein by reference.)

XXV.

The District Court erred in admitting the testimony of Helen Merle Beverlin with relation to any other matters or trips. (Typewritten transcript pp. 153-160, incorporated herein by reference.)

XXVI.

The District Court erred in restricting argument on the subject of the defendant's restraint as an alien.

XXVII.

The District Court erred in refusing instructions commencing with defendant's Instruction No. A on page 352 and ending on page 368 of the typewritten transcript, incor- [6] porated herein by reference.

XXVIII.

The District Court erred in giving an instruction: "I conclude and instruct you that as a matter of law the offense charged in case No. 15499, the other case, is and was not the same as the offense charged against the defendant in this case. (Page 276, typewritten transcript.)

XXVIX

The District Court erred in instructing the jury beyond the words "any person who shall knowingly transport or cause to be transported . . . in interstate or foreign commerce or in any territory," as set out on page 281 of the typewritten transcript, all other portions not being alleged in the indictment.

XXX.

The District Court erred in instructing the jury: "The woman transported is not an accomplice to her transportation whether she goes willingly or unwillingly and her testimony may be viewed in the same light that any other witness' would be viewed and need not be corroborated if you are willing to believe it alone and without corroboration." (Page 284, typewritten transcript.)

XXXI.

The District Court erred in giving the following instruction:

"It is sufficient to warrant a verdict of guilt if [7] you are convinced beyond a reasonable doubt from the evidence before you that the defendant

knowingly induced, persuaded, aided, abetted, or caused this woman to go from Los Angeles to Honolulu with the intent and purpose on the part of the defendant that she would engage in prostitution or debauchery, or any other immoral purpose, or that he aided or assisted in knowingly persuading, inducing, or enticing her and that he thereby knowingly caused or aided or assisted in causing this woman to be carried as a passenger on a common carrier in interstate commerce, that is to say, upon a steamship sailing from the Port of Los Angeles to the City of Honolulu, Territory of Hawaii. Whether or not the woman went as is charged, if you find she so did, with or without her consent, is immaterial." (Page 285, typewritten transcript.)

XXXII.

The District Court erred in giving the following instruction:

"The defendant may be found guilty of the offense charged in the indictment even though he in fact did not directly purchase her steamer ticket, and even though the money which was actually used was not the money that he provided, for the law does not require that the woman who is transported in interstate commerce for immoral purposes must use the identical money that is received from the defendant. It is sufficient if he aided or abetted in any [8] wise the woman in connection with her transportation from Los Angeles to the Territory of Hawaii with the intent upon his part that the purpose of this transportation was to have

Helen Merle Beverlin engage in prostitution. And this is true even though in fact the woman so transported did not actually engage in prostitution when she arrived at the destination." (Page 285, 286, typewritten transcript.)

XXXIII.

The District Court erred in instructing the jury as follows:

"You are instructed that there is no excuse or defense to the defendant on trial in this case that others are not on trial, or possibly have not been indicted, even though you may believe that others were implicated in the charge now before you. You are to consider the guilt or innocence of the defendant Di Marzo without regard to the culpability, or lack of culpability of others not on trial, or possibly as to others who may not have been indicted." (Page 290, typewritten transcript.)

XXXIV.

The District Court erred in its instructions as to "aiding and abetting," without any allegation in the indictment.

MORRIS LAVINE,

Attorney for Defendant and
Appellant.

Received copy of the within Assignment of Errors this 30th day of December, 1942.

LEO V. SILVERSTEIN,
United States Attorney.

By
Ass't. United States Attorney.

[Endorsed]: Filed Dec. 30, 1942. Edmund L. Smith, Clerk. By Irwin B. James, Deputy Clerk.

[Endorsed]: Filed Feb. 3, 1943. Paul P. O'Brien, Clerk. [9]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS
NOTICE OF HEARING

To Leo Silverstein, Acting United States Attorney,
and Norman W. Neukom, Assistant United
States Attorney:

Please Take Notice that the within Bill of Exceptions of the defendant and appellant, Joseph Di Marzo, will be brought on for settlement before the Honorable Peirson M. Hall, District Judge, in his court room, on January 25, 1943, at the hour of 10 A. M., or as soon thereafter as said matter can be heard.

Dated: December 30, 1942.

MORRIS LAVINE,
Attorney for Defendant and
Appellant.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant:

Joseph Di Marzo, Tuna Canyon Detention Station, Tujunga, California.

Name and address of appellant's attorney:

Morris Lavine, 620 Bartlett Bldg., Los Angeles, California.

Offense:

Violation of Mann Act, Section 398, Title 18, U. S. Codes, to-wit: transporting and causing to be transported one Helen Merle Beverlin to Honolulu, Territory of Hawaii.

Date of Judgment:

September 28, 1942.

Brief description of judgment or sentence:

Three years in a federal type of penitentiary and \$1,000 fine.

Appellant is confined.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Pursuant to Rule 5 I hereby serve notice that I elect to enter upon the service of my sentence pending appeal.

Dated: October 1, 1942.

JOSEPH DI MARZO,

Appellant.

MORRIS LAVINE,

Attorney for Appellant.

Grounds of Appeal:

1. The Court was without jurisdiction to try the defendant by reason of certain treaties between the United States and the Government of Italy, and by reason of his detention under a Presidential Order.

2. The defendant was denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

3. The defendant was denied the equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States.

4. The defendant was denied the right of counsel and adequate and effective right of preparation guaranteed by the Sixth Amendment to the Constitution of the United States.

5. The defendant was once in jeopardy by reason of the acquittal of Helen Merle Beverlin.

6. The Court erred in advising the jury to find against the appellant on the plea of once in jeopardy.

7. The Court erred in failing to direct the verdict in favor of the appellant.

8. The evidence was insufficient to support the verdict of guilty and was sufficient to sustain the defendant's plea of once in jeopardy.

9. The Court erred in various instructions given and refused.

10. The Court erred in its decision that Helen Merle. (Incomplete).

11. The Court erred in the admission of testimony of other acts and transactions not properly admissible under the case at bar.

12. The Court erred in its rulings on the admission and exclusion of testimony throughout the trial of the case.

13. The Court conducted the proceedings in the absence of defendant, in violation of the Fifth Amendment to the Constitution of the United States.

14. There was a communication between the Court and the jurors unauthorized by law.

15. The Court erred in refusing to send instructions to the jury upon its request.

INDICTMENT

No. 15,500

Filed Jul. 1, 1942

Viol: Section 398, Title 18, United States Code.

In the District Court of the United States in and for the Southern District of California, Central Division.

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California, on the first Monday of February in the year of our Lord one thousand nine hundred forty-two;

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California, upon their oaths, present:

That

JOSEPH DI MARZO

hereinafter called the defendant, whose full and

true name, other than as herein stated, is to the grand jurors unknown, late of the Central Division of the Southern District of California, heretofore, to-wit, on or about January 24, 1941, did knowingly, wilfully, unlawfully and feloniously transport and cause to be transported in interstate commerce a certain woman, to-wit, one Helen Merle Beverlin, also known as Judy Bradford, from the City of Los Angeles, County of Los Angeles, state, division and district aforesaid, and in the jurisdiction of the United States and of this Honorable Court, to the City of Honolulu, Territory of Hawaii, with the intent on the part of him, the said defendant, and for the purpose of having said Helen Merle Beverlin, also known as Judy Bradford, practice prostitution and debauchery and for other immoral purposes;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WM. FLEET PALMER,

United States Attorney.

A true bill,

Foreman.

[Endorsed]: Filed Jul. 1, 1942.

Los Angeles,
Wednesday, July 29, 1942

Hollzer
No. 15,500-Crim.

[Title of Cause.]

ORDER FOR CONTINUANCE

This cause coming on for arraignment and plea of defendant Joseph Di Marzo; R. E. Lazarus, Assistant U. S. Attorney, appearing as counsel for the said defendant, who is present in custody; and C. W. McClain, Court Reporter, being present and reporting the testimony and proceedings:

The defendant states his true name is as set forth in the Indictment, waives reading thereof, and pleads not guilty.

It is ordered that the cause be, and it hereby is, continued to July 30, 1942, at 10 A.M., for setting.

Los Angeles
Monday, August 3, 1942

Hollzer
No. 15,500-Crim.

[Title of Cause.]

ORDER PLACING CAUSE ON CALENDAR FOR SETTING FOR TRIAL

This cause coming on for setting for trial of defendant Joseph Di Marzo; R. E. Lazarus, Assistant U. S. Attorney, appearing as counsel for the Government; Morris Lavine, Esq., appearing

as counsel for the said defendant, who is present in custody; and R. T. Doidge, Court Reporter, being present and reporting the proceedings.

Attorney Lavine moves that the Court determine that it has no jurisdiction and states the grounds for the said motion.

The Court orders that any motions be made in writing with supporting authorities and be filed by August 4, 1942, and that the cause be placed on the calendar of August 7, 1942 at 2 P.M., for setting for trial.

No. 15499

No. 15500

[Title of District Court and Cause.]

OBJECTIONS TO THE JURISDICTION OF THE COURT.

Comes now Joseph Di Marzo and objects to the jurisdiction of the Court to try him in the District Court of the United States, Southern District of California, Central Division, on the above entitled indictment on the ground that a civil court is without jurisdiction to try the said De Marzo who is being held as an interned enemy alien prisoner of war at the Tuna Canyon *Canyon* Detention Station, Tujunga, California, and as grounds of his objection specifies as follows:

I.

The Treaty of the Hague relating to the treatment of prisoners of war (U. S. Treaty Series No.

846) signed at Geneva July 27, 1929; in force July 19, 1931; ratified by the following nations, is the supreme law of the land: Australia, Belgium, Brazil, Denmark, Great Britain and Northern Ireland, India, Italy, Latvia, Mexico, New Zealand, Norway, Poland, Portugal, Roumania, Spain, Sweden, Switzerland, Union of South Africa, United States of America and Yugoslavia.

This Treaty provides in Article 63 as follows:

“Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power.”

Article 75 of said Treaty provides:

“When belligerents conclude a convention of armistice * * * *

“Prisoners of war against whom a penal prosecution might be pending for a crime or offense of municipal law may, however, be detained until the end of the proceedings and if necessary until the expiration of the punishment.”

Pursuant to the Treaty of the Hague signed at Geneva July 27, 1929, ratified by the Senate of the United States January 7, 1932 and by the President of the United States on January 16, 1932, deposited with the Government of Switzerland February 24, 1932, and proclaimed by the President of the United States August 4, 1932, which contains covenants for the treatment of prisoners of war, it is implicit in said covenants by reason of Article 75 of said Treaty that a prisoner of war against whom a penal prosecution

might be pending for a crime or offense against municipal law may be detained for prosecution after an armistice and until the end of proceedings or until the expiration of the punishment for this violation, but may not be prosecuted and removed from such detention as a prisoner of war while he is subject for the purpose of prosecution, under local law.

The Treaty is the supreme law of the land.

United States Constitution, Article VI

It supercedes all local laws inconsistant with its terms.

Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628

Geofroy v. Riggs, 133 U.S. 258, 33 L.Ed. 642

Chirac v. Chirac, 2 Wheat. 259, 4 L.Ed. 234

Kull v. Kull, 37 Hun, 476

Treaties which regulate the conduct of prisoners between nations during time of war survive after the outbreak of war.

Hall International Law, p. 398, 401

2 Westlake International Law, p. 34

The Magna Charta provides:

“If in time of war merchants of the country at war with us shall be found in our country at the outbreak of war, they shall be attached with the damage to their business or their goods until it is known to us or to our Chief just how merchants of our country who are then found in the country at war with us are treated; and if ours

are safe there, the others shall be safe in our country.”

2 Westlake International Law, p. 44

2 Holdsworth History of English Law,
p. 393

The Statute of Staples, 27 Edw. 3, p. 1354

The question observed in international law pursuant to the treaty of the parties is political in that it seeks to secure for nationals of one country the same treatment as is secured to nationals of the other country in the United States.

A holding by the courts of this country, that they may remove an enemy alien from a concentration camp for trial, would set a precedent for other countries to do likewise.

In 1940 the regulations of the United States War Department stated:

“Every person captured or interned by a belligerent power because of war is, during the captivity or internment, a prisoner of war, and is entitled to be recognized as such under the law of war.”

(United States War Department Mobilization Regulations No. 1 to 11 (1 April 1940) page 3.)

In the case of *Arce v. Texas*, L.R.A. 1918 E, p. 358, the Texas Court of Criminal Appeals held that the civil courts of Texas have no jurisdiction to try and punish Mexicans who have invaded the United States in the prosecution of war.

II.

A trial of Di Marzo while he is an interned enemy alien would deprive him of a fair and im-

partial trial, and would try him in an atmosphere of passion and prejudice, such as is forbidden by the provisions of the Fifth Amendment to the Constitution of the United States, guaranteeing to all persons due process of law.

The element of fair trial is guaranteed by due process of law.

Lisenba v. California, 86 L.Ed. 179

Mooney v. Holohan, 294 U.S. 103, 79 L.Ed. 791 98 A. L. R. 406

Chambers v. Florida, 309 U.S. 227, 84 L.Ed. 716

Brown v. Mississippi, 297 U.S. 278, 80 L.Ed. 682

Frank v. Mangum (trial dominated by mob) 237 U.S. 309, 59 L.Ed. 969

Every person is entitled to have a fair and impartial trial by an impartial jury, uninfluenced by passion and prejudice and uninfluenced by any other consideration than the evidence produced at the trial.

United States v. Socony Vacuum Oil Co.,
310 U.S. 150, 239, 84 L.Ed. 1176, 1177,
Headnote 30

Betts v. Brady, 86 L.Ed. 1120

Randle v. State, 34 Tex. Crim. Rep. 45,
28 S.W. 953

Coffman v. State, 62 Tex. Crim. Rep. 88,
136 S.W. 779

Richmond v. State, 16 Neb. 388, 20 N.W.
282

Streight v. State, 62 Tex. Crim. Rep. 453,
138 S.W. 742

Meyers v. State, 39 Tex. Crim. Rep. 500,
46 S.W. 817

Barnes v. State, Tex. Crim. Rep.,
59 S.W. 882 14 Am. Crim. Rep. 229

Alaroon v. State, 47 Tex. Crim. Rep. 415,
83 S.W. 1116

Gallaher v. State, 40 Tex. Crim. Rep. 296,
50 S.W. 393 11 Am. Crim. Rep. 207

Dobbs v. State, 51 Tex. Crim. Rep. 629,
102 S.W. 918

Powell v. Alabama, 287 U.S. 45, 77 L.Ed.
158

III.

Defendant Di Marzo further objects on the ground that a trial at this time would deny him the equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States in that it places him in a different category than persons similarly situated, and places him in a position where he cannot get the same equal justice as persons who are not under the cloud of being detained, interned enemy alien.

Hysler v. Florida, 62 L.Ed. 688, 694

Yick Wo v. Hopkins, 30 L.Ed. 220

Truax v. Raich, 239 U.S. 33, 60 L.Ed. 131

Barbier v. Connolly, 28 L.Ed. 923

Moore v. Dempsey, 261 U.S. 86, 67 L.Ed.
543

Neal v. Delaware, 103 U.S. 370, 26 L.Ed.
567

Frank v. Mangum, 237 U.S. 309, 59 L.Ed. 909

Truax v. Corrigan, 66 L.Ed. 254, 263

IV.

Defendant Di Marzo further objects that a trial at this time would deprive him of right guaranteed under the Sixth Amendment to the Constitution of the United States in that this section entitles a person to the right of private consultation and conference with counsel whenever and wherever he desires. Defendant is interned in a concentration camp approximately fifteen miles from Los Angeles, has no access to a telephone or privacy of conference with counsel or of preparation, as all conferences with his counsel are held in the shadow of an immigration officer, always present. The right of effective aid of counsel include the right to effective preparation for trial.

Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158

Johnson v. Zerbst, 304 U.S. 458

Betts v. Brady, 86 L.Ed. 1117 and cases there cited.

Chin Yow v. United States, 208 U.S. 7, 52 L.Ed. 369

Ex parte Chin Loy You, 223 Fed. 833

Wherefore, Joseph Di Marzo objects to the jurisdiction of the Court to try him on the grounds that he is now interned as an enemy alien and any trial of him at this time and under the present conditions would be in violation of the treaties of the United

States, the Constitution of the United States, and the laws made and provided therefor.

Respectfully submitted,

MORRIS LAVINE

Attorney for Defendant

Joseph Di Marzo

Received copy of the within this 5 day of
Aug 1942.

R. E. LAZARUS

Attorney for U. S.

[Endorsed]: Filed Aug 7 1942.

Tuna Canyon Detention Station,
Tujunga, California

AFFIDAVIT OF JOSEPH DI MARZO

State of California

County of Los Angeles—ss.

I, Joseph Di Marzo, being first duly sworn, depose and say:

That I am at present interned at the Tuna Canyon Detention Station, Tujunga, California, as an enemy alien prisoner of war, and that my assets are frozen in the Bank of America, 12th and K Streets, Sacramento, California, and I am without ready funds, until such funds are released, to pay my counsel and for costs of court until my box and my bank account in this bank are unfrozen or power is given to someone to secure the same.

I am at all times detained in the Tuna Canyon

Detention Station, Tujunga, California, and have no way of locating witnesses myself or their addresses. I cannot use the telephone except to call my attorney, collect, and no persons can visit me in private. My attorney is allowed to talk to me at the internment camp but within the view of an immigration officer and facilities are such as to make privacy at the camp impossible.

I aver that due to my status as an enemy alien, I am clothed with an atmosphere of prejudice and hostility and that I cannot receive a fair and impartial trial by reason of that fact alone.

I further aver that I am unable to prepare my defense properly while interned in camp as I cannot myself locate witnesses whose whereabouts I alone may be able to discover and further, it may be necessary to locate a witness who is in Honolulu, Hawaii, for the purpose of taking a deposition or securing the return of said witness for my trial. Such funds as I have to enable me to do these things are now frozen.

JOSEPH DI MARZO

Subscribed and sworn to before me this 3rd day of August, 1942.

ZOA L. ZACCHE

Notary Public in and for the County of Los Angeles, State of California.

Received copy of the within this Aug 5/42.

R. E. LAZARUS

Attorney for U. S.

Saturday, August 8, 1942

Ling

Los Angeles

No. 15,500-Crim.

[Title of Cause.]

HEARING ON OBJECTIONS
OF DEFENDANT

This cause coming on for hearing objections of defendant to jurisdiction of this Court and for plea:

N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the defendant, Joseph Di Marzo, who is present and in custody, and Mack Racklin, Court Reporter, being present and reporting the proceedings:

Attorney Lavine makes opening statement in behalf of defendant's objections to jurisdiction of this Court, reviewing proceedings antedating the present matter.

Attorney Neukom makes a statement that the defendant is not a prisoner of war but is being merely detained in a detention camp to answer the charge contained in the Indictment.

Attorney Lavine argues further, claiming the defendant is a prisoner of war, and cites authorities in support thereof, and that, therefore, this Court does not have jurisdiction in this case.

Attorney Neukom states his office has written for authority to dismiss Case No. 15-499-Crim.

Attorney Lavine now argues in support of motion of the defendant for Judgment of Acquittal.

Attorney Neukom argues in opposition to said

motion for a Judgment of Acquittal inasmuch as Case No. 15-499-Crim. will be dismissed on authority of the U. S. Attorney General.

Objections and motion for Judgment of Acquittal are ordered overruled, to which counsel for the defendant notes an exception.

And, the defendant being now called before the Court for entry of plea, and upon being asked to enter his plea, pleads not guilty in Case No. 15-500-Crim., it is ordered that Case No. 15,500-Crim. be, and it hereby is, set for trial before Judge Hall on September 9, 1942.

Attorney Lavine also enters a plea of once in jeopardy in behalf of the defendant in Case No. 15,499-Crim., and thereupon moves the Court for an order allowing counsel to interview the defendant without restrictions now in force in the detention camp where the defendant is confined; whereupon, Attorney Neukom assured the Court and counsel that the camp will be specially instructed to allow counsel for the defendant and the defendant to prepare for trial without the imposition of the usual restrictions of said camp, but that the defendant can not be taken to the office of his attorney. Therefore, the Court makes no ruling thereon.

At a stated term, to-wit: The February Term, A D 1942.

Of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles

on Saturday the 8th day of August in the year of our Lord one thousand nine hundred and forty-two.

Present:

The Honorable: Dave W. Ling, District Judge.

No. 15,499-Crim.

[Title of Cause.]

This cause coming on for hearing (1) objections of defendant to jurisdiction of this Court, and (2) motion of defendant for Judgment of Acquittal
and

No. 15500-H Crim.

[Title of Cause.]

This cause coming on for hearing objections of defendant to jurisdiction of this Court and for plea:

N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the defendant, Joseph Di Marzo, who is present in custody; and Mack Racklin, Court Reporter, being present and reporting the proceedings:

Attorney Lavine makes opening statement in behalf of defendant's objections to jurisdiction of this Court, reviewing proceedings antedating the present matter.

Attorney Neukom makes a statement that the defendant is not a prisoner of war but is being merely detained in a detention camp to answer the charge contained in the Indictment.

Attorney Lavine argues further, claiming the defendant is a prisoner of war, and cites authori-

ties in support thereof, and that, therefore, this Court does not have jurisdiction in this case.

Attorney Neukom states his office has written for authority to dismiss Case No. 15,499-Crim.

Attorney Lavine now argues in support of motion of the defendant for Judgment of Acquittal.

Attorney Neukom now argues in opposition to said motion for a Judgment of Acquittal inasmuch as Case No. 15,499-Crim. will be dismissed on authority of the U. S. Attorney General.

Objections and motion for Judgment of Acquittal are ordered overruled, to which counsel for the defendant notes an exception.

And, the defendant being now called before the Court for entry of plea, and upon being asked to enter his plea, pleads not guilty in Case No. 15,500-Crim., it is ordered that Case No. 15,500-Crim. be, and it hereby is, set for trial before Judge Hall on September 9, 1942.

Attorney Lavine also enters a plea of once in jeopardy in behalf of the defendant in Case No. 15,499-Crim., and thereupon moves the Court for an order allowing counsel to interview the defendant without restrictions now in force in the detention camp where the defendant is confined; whereupon, Attorney Neukom assured the Court and counsel that the camp will be specifically instructed to allow counsel for the defendant and the defendant to prepare for trial without the imposition of the usual restrictions of said camp, but that the defendant can not be taken to the office of his attorney. Thereupon, the Court makes no ruling thereon.

No. 15500

[Title of District Court and Cause.]

OBJECTION TO THE JURISDICTION
OF THE COURT.

Comes now Joseph Di Marzo and objects to the jurisdiction of the Court to pronounce judgment against him on the ground that said trial and procedure is in violation of the treaties and Constitution of the United States and statutes made and provided in his case.

Dated: September 21, 1942.

MORRIS LAVINE per C. B. H.
Attorney for Defendant.

Received copy of the within.....this 21st day
of September, 1942.

LEO V. SILVERSTEIN,
U. S. Attorney,
Attorney for Plaintiff.

M.

[Endorsed]: Filed Sept. 21, 1942.

No. 15500

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes now the defendant and moves in arrest of judgment that the Court was and is without jurisdiction to try him or to pronounce judgment against him in this case.

Said motion is based upon all the records and files, and statutes and decisions heretofore filed in said case.

Dated: September 21, 1942.

MORRIS LAVINE,
Attorney for Defendant.

Received copy of the within.....this 21st day of
September, 1942.

LEO V. SILVERSTEIN,
U. S. Attorney,
Attorney for Plaintiff.

HKM

[Endorsed]: Filed Sep. 21, 1942.

No. 15,500

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now the defendant, Joseph Di Marzo, and moves for a new trial on the following grounds:

I

The Court erred in holding private communications with the jury while they were deliberating on the cause.

II

The Court erred in refusing to send the written instructions to the jury, at their request, while they were deliberating on the cause.

III

The Court erred in holding the trial in the absence of the defendant and his counsel.

IV

The Court erred in rulings made throughout the trial of the case.

V

The verdict is contrary to the laws and the evidence. The evidence is insufficient to support the verdict.

VI

The Court erred in its rulings and decisions throughout the trial and proceedings in the case.

VII

The procedure and proceedings in the case violated the Fifth Amendment to the Constitution of the United States, entitling a defendant to due process of law and the equal protection of the laws.

VIII

The Court was without jurisdiction to proceed with the trial of the case.

IX

The trial was had in violation of the treaties and Constitution of the United States.

Dated: September 21, 1942.

MORRIS LAVINE,

Attorney for Defendant.

POINTS AND AUTHORITIES

In federal courts, except in matters governed by the federal Constitution or by acts of Congress, law to be applied in any case is the law of the state.

Erie R. Co. v. Tompkins, 58 S. Ct. 817, 114 ALR 1487

Section 1137 of the Penal Code of California provides that the jury may take the written instructions to the jury room where the jury asked for the instructions. It is the right of the prosecution or the defense to have the instructions sent to the jury when the jury requests it.

People v. Cochran, 61 Cal. 548, 554

People v. Dunlop, 27 Cal. App. 460, 470

Any conduct with relation to the jury which is apt to influence the jurors or which pertains to their deliberations, is reversible error.

Brasfield v. United States, 71 L. Ed. 345

The Court erred in thus holding the trial in the absence of the defendant and his counsel. Such conduct constitutes reversible error.

Fifth Amendment, Constitution of the United States

Yick Wo v. Hopkins, 30 L. Ed 220

Hysler v. Florida, 62 S. Ct. 688

Clyatt v. United States, 59 L. Ed 732

Defendant, due to his status as an interned alien could not be fairly tried.

Lisenba v. California, 86 L. Ed. 179

There was no evidence of transportation or causing transportation as those words are defined in the statute.

Received copy of the within Motion for New Trial
this 21 day of September, 1942

LEO V. SILVERSTEIN,

United States Attorney

By HKM,

Attorney for Plaintiff

[Endorsed]: Filed Sep. 21, 1942.

No. 15500

[Title of District Court and Cause.]

AFFIDAVIT OF MORRIS LAVINE

State of California,

County of Los Angeles—ss.

Morris Lavine, being first duly sworn deposes and says.

That he is the attorney for the above-named defendant, Joseph Di Marzo; that the jury in the above case was sent out to deliberate in the case on September 18, 1942, and affiant is informed and believes that after the jury retired to deliberate there was a private communication from the jury to the Judge presiding in the trial of the case, asking the Judge to send in the written instructions which has been read to them by the Court; that the Court had read numerous instructions to the jury, all of them being

in writing, relating to the question of guilty or not guilty and to the question of once in jeopardy; that affiant is informed and believes that the Court then privately communicated to the jury that he would not send in the instructions to them, and that the written instructions were not sent in to them; that the Court did not reconvene court and call the jury in, nor was the defendant or his counsel present at any time during the interchange of communications thus privately made between the jury and the Court.

MORRIS LAVINE.

Subscribed and sworn to before me this 21st day of Sept., 1942.

-----,
J. F. MORONEY,
County Clerk.

By N. HOLLISTER,
Deputy.

Received copy of the within.....this 21st day of September, 1942.

LEO V. SILVERSTEIN,
U. S. Attorney.

HKM,
Attorney for Plaintiff.

[Endorsed]: Filed Sep. 21, 1942.

TESTIMONY.

Mr. Neukum: I would like to move for a dismissal of the action in Case 15,499 pursuant to the authority of the Attorney General.

Mr. Lavine: We object to the motion for dismissal and we ask the Court to enter a judgment of acquittal, and I would like to be heard on that, your Honor. There has been a trial as to one defendant, a co-defendant, a conspiracy charge, and the co-defendant has been acquitted. Therefore, it is my contention that the acquittal of a co-defendant necessarily acquite the other defendant on a charge of conspiracy.

The Court: Well, I think I will grant the motion, and postpone to such other time, any other motions you have had to make in connection with the matter.

Case 15,499 Criminal will be dismissed.

Mr. Lavine: May the record now show affirmatively that the defendant answers that he is not ready for trial by reason of the objections and motions heretofore made and which he further intends to present at length after the impanelment of the jury, and the argument, and also that we wish to present the additional ground that the indictment is null and void because it was not returned by a Grand Jury of the Federal Court constituted in accordance with the procedure as set up for the proper impanelment of Grand Juries. That is an additional matter I intended to present.

The Court: Your first motion is a motion for a continuance?

Mr. Lavine: That is correct.

The Court: And your second motion is a motion to quash?

Mr. Lavine: That is right. My first motion for a continuance is based on the fact that the defendant has not been able to adequately prepare for trial by reason of the situation in which he is personally confronted; that he has been denied the effective right of counsel, and denied, under this amendment to the Constitution of the United States that he has not had the opportunity and has been discriminated against and treated differently than other persons in a like situation should be treated. It is a situation in which he finds himself through no fault of his own, and for that reason my first motion is addressed to a continuance until both he and his counsel may receive proper relief under the premises, and for a period of at least 30 or 60 days.

(Roll call of jurors made by the clerk and the jurors are excused until 11:05 A. M.)

Mr. Lavine: Your Honor, there are certain matters that might be presented either by way of testimony or by way of stipulation as to somethings, I believe, since the last hearing in this matter. But I think, first of all, I should acquaint your Honor with the proceedings that have gone heretofore, very briefly, and we can possibly stipulate to those [2*] things as matters of fact.

* Page numbering appearing at foot of page of Testimony in Bill of Exceptions.

The defendant, Mr. Joseph Di Marzo has been interned in the Tuna Canyon Detention Station at Tujunga, California. He was first taken in on April 7th at San Pedro Station and then was moved to the Tujunga Station on May 8th.

The Court: What is the first date?

Mr. Lavine: April 7, 1942, and then he was transferred to Tujunga Station on May 28th as an Italian alien, awaiting hearing before the Alien Enemy Board. I might point out that the indictment in this case was not returned until July 1, 1942, and while the defendant was actually in this detention station at Tujunga.

The Court: Was there ever a previous warrant? When was the warrant first issued? A complaint was filed. I see affidavits——

Mr. Neukom: The warrant was issued April 2nd. A complaint was filed at that time.

The Court: Is that a stipulated date, April 2, as the date of the complaint having been filed?

Mr. Lavine: Yes, I will so stipulate. The defendant was apprehended on this charge and was released on bond of \$2500. The defendant here was wanted and he came down and surrendered, on April 5th, and his bond was then fixed at \$2500. He secured his release on bond and thereafter a request was made for an increase of the bond and the bond was increased to \$10,000, and he did furnish the increased [3] bond.

The Court: That was after the indictment?

Mr. Lavine: That was on the complaint, your Honor.

Mr. Neukom: That is correct.

Mr. Lavine: And then he was released on bond to do whatever he wished to do. On April 6th he was released on bond.

The Court: He was placed in the detention camp as an alien enemy?

Mr. Lavine: That is right.

The Court: As a citizen of Italy, on April 7th?

Mr. Lavine: That is correct.

The Court: And has since and is now?

Mr. Lavine: Has since and is now detained there. At the first hearing that we had before Judge Hollzer, there was other counsel at that time, and I came into the case immediately thereafter, and found this situation to exist: the defendant, being at the Tujunga Station, was permitted to place a telephone call to me with reverse charges. I went out and saw him at the Tujunga Station. I saw the defendant on or about July 25th at the detention station at Tujunga. That was the first time, and there conferred with him at the detention station at Tujunga. I think it can be stipulated that that station is about 20 miles from here.

Mr. Neukom: I think so.

The Court: He did have other counsel in the meantime? [4]

Mr. Lavine: No, he had had other counsel who had gotten out of the case.

Mr. Neukom: George Stahlman represented him.

The Court: Until when?

Mr. Lavine: Well, he explained to the Court—he had withdrawn before that time, he had gotten

permission from the Court to be relieved, and the Court informed the defendant that he would have to make arrangements, if he could, for other counsel. Mr. Stahlman withdrew on the Monday preceding that, I believe, or at the previous session. I wasn't there but I talked to Mr. Stahlman about it.

The Court: So that the defendant had counsel from the date of his arrest?

The Defendant: I never saw the counsel only once.

The Court: Well, if he was counsel of record, he had counsel.

Mr. Lavine: He was represented by Mr. Stahlman, your Honor, who surrendered him, and he was counsel of record until the Court gave him permission to withdraw.

The Court: Would that be in the minutes here, Mr. Clerk, or in the file?

The Clerk: I should be. It states here, "It is ordered this case must proceed to a jury trial and relieving Attorney Stahlman as counsel for the defendant."

The Court: So Mr. Stahlman was representing the defendant until July 30th officially. [5]

Mr. Lavine: That is correct. And on July 30th I appeared before Judge Hollzer and explained the predicament in which both my client and I found ourselves. All of his then assets were frozen. He had assets with which to pay counsel but could not unfreeze them. He had assets with which to make a proper investigation, but couldn't use them. He

had assets to subpoena witnesses through the Marshall, but no funds were available. He had no assets to pay for a telephone, because they were frozen. He had no means to pay me even for the gasoline that I had to use to confer and consult with him.

Under the circumstances, we explained that situation and I entered objections to the trial proceeding, which the Judge suggested be made in writing. In the meantime, in order to facilitate a proper defense of this defendant, and in the discharge of my duties both as an officer of the Court and my duty to my client, we applied to the Federal Reserve Bank of San Francisco for a proper license for them to release funds which he had in a safety deposit box in Sacramento in the sum of \$1000.00 in cash.

Their answer was received, and in the meantime another situation developed in the course of my reading and studying of this matter that, under the "Trading with an Enemy Act" there appeared in the State Bar Journal of the State of California an article headed "Presidential License Required for a Lawyer to Represent Enemy Alien", and it was very [6] illuminating. That article was written by Carroll S. Butcher of the San Francisco Bar, who contends that, under that Act, a lawyer to represent an enemy alien had to be licensed. Now, I personally have my difference of opinion as to the interpretation of the Act, but still there is an able lawyer's interpretation of the Act, and there is the situation that confronted me personally.

As I say, I had no right to represent him without proper authority or without proper designation, and whether, even though I were to represent him, I could use any funds that he might have to pay my fee and even pay the necessary expenses which I might be put to in the proper defense of this matter.

At the suggestion of Mr. Neukom, I wrote to the Attorney General and have not, to this date, received a reply to my inquiry.

The Court: Do you have a copy of your letter?

Mr. Lavine: Yes.

The Court: We are taking all of these things more or less informally and if there is no challenge as to the veracity of the statement——

Mr. Neukom: No. I told Mr. Lavine about that Act, but I was very confident that it did not apply in this instance because only a few months before I had spoken to Marion Wright, whom I have a lot of respect for. He represented a great many Japanese, and he explained to me that he [7] had written to the Attorney General and the Attorney General's attitude is that that Act pertaining to attorneys applies only when they are actually representing various organizations or representing some enemy alien in connection with the actual trading, as the name of the Act implies. But to represent some individual who is an enemy of this country does not come within the purview of the Act. That is to be found in one of the recent supplements to the Code under "War" Title 50. It don't apply

to people entirely local. It is for the purpose of giving aid to corporations.

The Court: Well, anything that is National or International starts out being local, and I can well see that it might have been the intention of Congress to have required a license for lawyers, because it would be a very easy thing for a dangerous alien, who might be interned and who might have large assets, to carry on any nefarious act in the country by the release of money under the guise of counsel fees, even though it might be a release of money in a house lease or some very simple or legal matter. Well, I have to see the Act first.

Mr. Lavine: I have it right here. I think we have a copy right here. It is Title 50, Subsection 7, particularly "Trading with the Enemy Act." That was the old act of 1917.

The Court: Well, was there not an amendment to that act?

Mr. Neukom: Yes, there was a new one and I think the [8] effective date was about July 10th. It was passed as a complete act. It is a rather lengthy act.

The Court: Well, it would be rather an anomalous situation if the United States Government, acting through the United States Attorney General, could prosecute a man who came as an alien, and then, at the same time, the United States Government, acting through the Attorney General, could say, "We refuse, or we cannot grant a license to hire so and so as your Lawyer," on the other hand.

The Act of 1917, Mr. Neukom, is very broad and prohibits to trade or attempt to trade, and the definition of "to trade" is to have any form of business, or commercial communication or intercourse with, or enter into, carry on, complete or perform any contract, or contracts, or immediate obligation. The words, "Trading with the Enemy" would imply buying and selling. But as I pointed out, it could defeat the complete purpose of the Act if it did exclude the payment of fees to lawyers, because thereby large sums could be released to lawyers under the guise of professional representation, and where are you going to draw the line of professional representation, whether a man is accused criminally in the United States Courts, or in the State Courts, or in connection with a civil matter if he wants to consult with and pay a good lawyer in connection with a contract or an adoption or a guardianship proceeding, or some such matter?

Mr. Neukom: Well, your Honor, the reasoning would [9] follow in its logical sequence and would mean then that any enemy alien would be specifically immune from prosecution for any crime he had committed.

The Court: Only so long as he is detained, as I understand. In other words, when he is detained in custody.

Mr. Neukom: No, the Act applies to all aliens, all enemy aliens regardless, that is those who come within the commercial aspect of the Act. The Act provides a safeguard against such dealings which,

through the acts of individuals or corporations, might give aid to the enemy, and so that the government might have at all times knowledge as to these monies and so that they could not be utilized in the manner as you have explained and possibly could afford aid to the enemy. Now, a violation, that, of course, would not stop the trial of a case because, if it be a violation, it is a violation by the attorney to so represent a man. And Mr. Lavine, if his argument is tenable, has violated the act by appearing in court here on July 25th and on August 8th, and Mr. Lavine, I think, fully knows that he has violated the Act and that he is entirely immune from any prosecution and he certainly will not be confronted with any such proceeding.

The Court: If the Attorney General should, however, hold that a man must have a license, then Mr. Lavine will find himself in the position of having represented a man, not violating the law but to have represented him for nothing. [10] Of course, there has been no representation that the client is capable of doing that, or that he has assets which are sufficient to pay, or if he is willing to pay.

Mr. Lavine: I am coming to that part of the argument.

The Court: You have received no reply from the Attorney General?

Mr. Lavine: That is correct, and this is my letter to him.

The Court: Do you have a copy of the reply that was received in the similar case, Mr. Neukom?

Mr. Neukom: No, only in talking to Marion Wright. I asked him some time ago what the situation was, and he told me that he had received a letter from them but that the impression that he had gathered was that it only applied as I have tried to explain, that is in commercial ventures whereby a party who was actually representing, say, a person living in Italy and an attorney was representing him in the States whereby monies might be going over there, or representing some corporation which was entirely an enemy corporation, such as some of the Japanese corporations that formerly existed here. That is, most of the stock was held by a Japanese or Japanese enterprises, and instances such as that. That was his impression. I think, unless we have this Act, your Honor, that we are rather begging time, and I would like to try to find it for you and if we could have just a few minutes' recess, that could be obtained. [11]

The Court: Well, I believe we should have the jury come back here tomorrow morning because it will be five minutes after 11:00 before we know it. In connection with this matter, I think that the defendant here is entitled to counsel, and if he is entitled to counsel he is entitled to pay counsel and counsel is entitled to be paid, if he has the ability to pay him. And in that case, I think it would be most unjust if we should force the defendant to trial and force defendant's counsel to take a chance in defending these matters: No. 1, as to whether or

not he was committing a crime in violation of the law in so defending him; and No. 2, whether or not some governmental agency is ever going to grant a license or permit to pay him after he had rendered his services.

Mr. Neukom: Well, I think Mr. Lavine will tell you that he has had monies released to him and has been paid.

The Court: Have you had?

Mr. Lavine: I haven't used it. I had \$500 we took out of the box, but under questionable circumstances. That is, I should say, I went to the Federal Reserve Bank in San Francisco. That is what I was going to relate to your Honor. Only last Friday I had the defendant apply for a license to enter the box. Or rather, on August 3rd, through the Federal Reserve Bank, to enter the box and take money out for the purpose of paying me.

On August 8th, 1942, I personally wrote to Francis [12] Biddle, as follows: "I have been retained to represent Joseph Di Marzo in the District Court of the United States, Southern District of California, Central Division, who stands indicted under No. 15,500 of this District on charge of violation of the Mann Act.

"Some question has been raised in this State as to whether an attorney may represent a person interned as an enemy alien. Mr. Di Marzo is at present confined at the Tuna Canyon Detention Station, Tujunga, California, as an Italian National.

"In order that there may be no question as to my authority to represent him, and to make such con-

tracts as are necessary for witness fees and any details incident to a proper defense of this action, I hereby apply for permission, under the authority vested in you as Attorney General of the United States.

“It may be that no such permission is necessary, but there has been no construction placed upon this Act either by decisions out of your office, or by any judicial decisions of which I am aware.”

The Court (Interposing): That is a license from the President. As to that, you should apply to the President.

Mr. Lavine: A license from the President is not the form I had Mr. Di Marzo use. That was made through the Federal Reserve Bank of San Francisco, and what I am reading now is the letter to the Attorney General in which I applied [13] for authority to him because of those matters, because of the act of the President which refers all those matters to the Attorney General. In other words, the President has designated the Attorney General as the man who is to determine all of these questions.

The Court: This article here says, “Federal funds controlled by the Department of the Treasury.”

Mr. Lavine: Yes, but the authority to use them must come from the Attorney General; that is, the Attorney General has the authority, under the authority issued by the President, to refer the matter to the Attorney General, for a proper license on any particular situation. I also wrote the Sec-

retary of the Treasury and that is on the general licensing. I wrote that my client has officially applied for permission to pay me for my services from assets that are frozen, and my request includes the transaction involving the payment to me of my fee and money for the—in fact, the balance of the letter reads as follows:

“My client has applied officially for permission to pay me for my services from assets that are frozen, and my request includes the transaction involving the payment to me of my fee and for the money for the transaction therein involved.

“Thanking you in advance for your consideration and determination of this matter, I beg to remain most respectfully yours.” [14]

The Court: What assurance have you that your client has money to pay your fee? In other words, were I just to appoint you as counsel, and you were to represent him as an indigent person?

Mr. Lavine: I have a contract and an understanding and agreement, and pursuant to that contract and understanding and agreement, he wrote out a power of attorney, under the general license that was issued under the authority of the Act, that any enemy alien may use \$500 for personal living expenses per month, up to \$500. I thereupon went to the Federal Reserve Bank in San Francisco, paid my own expenses, and I talked to the vice-president there, and he said he was in no position to interpret the Act. I beg your pardon, that is the assistant cashier I talked to, Mr. L. Eberson, and he had no authority to interpret the Act. He hunted

up the correspondence, the application of the defendant for a license, and it had been unanswered since August 3rd and still remained there, although it had been forwarded to Washington and there had been no reply and no consent given. He said, "I could go to the bank in Sacramento," which I did, "and if they wanted to permit me to enter the box, that was their concern." When I got there, they told me they had communicated with the Treasury Department but had received no reply and no authority, but that they would permit me to enter the box, which they did, and they permitted me to take \$500 from the box and which [15] was converted into a commercial check which I brought down with me.

Mr. Neukom: I have found the present Act, I think. May I ask for the opinion of the State Bar and see if it does not refer to the said Act?

The Court: No, I don't think it does.

Mr. Lavine: No, that refers to foreign agents only.

The Court: I suppose we had better take at least a few minutes until you can find the Act. Were those matters presented to Judge Ling?

Mr. Neukom: No, those are new matters.

Mr. Lavine: In other words, I went to San Francisco last Friday, and there was a statement of Judge Ling at the time that we were unable to get any money, or rather I made the statement to Judge Ling that we were unable to get any money or other things developed that could be brought up for preparation of the proper defense of this de-

fendant, and Judge Ling stated that they could be shown at the time they occurred, or at the time of trial.

Mr. Neukom: When this matter was presented to Judge Ling, you called his attention to this particular matter.

Mr. Lavine: I called the Judge's attention to the particular acts, but not to the particular circumstances, as far as I personally was concerned.

The Court (To Mr. Lavine): You mean not to your efforts in that connection or the lack of any definite decision on [16] the part of any governmental agency?

Mr. Lavine: That is correct; there has been no decision, and we were hopeful that we would hear concerning it. After all, it had been pending since April 3rd and we were direct in the matter. We went down to the Federal Reserve Bank that very day, I believe, or the day after, and then I had to go to San Francisco to further the matter, and I went to Sacramento to further the matter.

Mr. Neukom: I told Mr. Lavine at the time of the hearing that I would assist him in any way possible.

Mr. Lavine: That is correct.

Mr. Neukom: And he didn't send me a copy of the letter he wrote to the Attorney General, and now the government has brought two people from Tehachapi and one from San Quentin. We have been put to a terrific expense, and in addition to that, Mr. Lavine does not present to this Court any matter or any thing on which we have assur-

ance as to whether or not this motion is really being made in good faith, or no potential evidence.

The Court: He hasn't said that he cannot obtain witnesses yet. He has been dwelling so far on the fact that he cannot obtain any money, or, more than likely, counsel fees. I wouldn't have any hesitancy in appointing Mr. Lavine as counsel for this man, providing it were shown that he was an indigent person, but where a man has ability to pay, I think counsel is entitled to be paid, and I think that the [17] defendant is entitled to choose whatever counsel he wants to have represent him.

Mr. Lavine: I suppose the United States Attorney should make representation to the Attorney General that some answer should be expedited in this matter.

Mr. Neukom: I most certainly would have done so had I had a copy of that letter, but I was very definitely of the opinion that the answer did not apply, and, in fact, Mr. Lavine was told at the time that he appeared before Judge Ling that we guaranteed and promised him immunity. I think the record will show that.

Mr. Lavine: I don't want to have to try a case with a guarantee of a promise of immunity. I think, without a clear definition of the Act, that the Northern District might have something to say, although I have proceeded because I thought perhaps we might have to go to trial and I have spent time and money and efforts, and everything possible, to get the fee expedited and prepare the case.

Mr. Neukom: I would like to read and file with

the Clerk a teletype I have just forwarded to the Attorney General:

“Re U. S. versus Joseph Di Marzo, Docket No. 15500. Attorney Morris Lavine representing defendant claims he wrote your office in August as to his liability to represent this defendant in criminal proceedings now on trial in view of the provisions of ‘Trading [18] with the Enemy Alien Act of 1917,’ and the ‘Foreign Agents Registration Act’ as amended this year, but has received no reply. He urges a continuation because he thinks he might be subject to prosecution by representing this alien enemy although we have assured him no prosecution would be had. We feel that does not apply and that he is entitled to fees from enemy alien as counsel fees, some of which he has received. Would appreciate an immediate response from your office as to interpretation, whether he must register with the Attorney General, and an assurance that he is secure in representing this enemy alien in this particular criminal proceeding. Court is awaiting your response.”——

“United States Attorney, Los Angeles.”

The Court (To Mr. Neukom): You may file that.

Mr. Neukom: Now the situation with regard to the trading with the Enemy Alien Act of 1917, is rather unique, in that Mr. Lavine should urge, as he has. There is certainly not a reported case under any of those sections where any attorney was compelled to represent or was subject to prosecution for representing an enemy alien. I think the Court will take judicial notice of the fact that many aliens

are even, in this country, accorded the right to proceed in civil actions and are being represented by counsel, and all the cases hold that unless those rights [19] are definitely suspended by Executive or other Congressional enactment, an enemy alien is entitled to the provisions of the Fourteenth Amendment, which is equal protection of the law, and he is accorded the same rights as anyone else.

Now the particular point was not presented in this case here, but is to some degree similar. It is a District Court case decided in 1917. I am merely citing it, 243 Fed. 419, where a German naval officer off of a cruiser, a German cruiser, had been interned or prosecuted under the Alien Act, and also for smuggling certain equipment, scientific matter and equipment into the country, and he contended there that he was entitled to diplomatic immunity and he could not be prosecuted in the civil courts. I cite that case, as that is one of the contentions that Mr. Lavine urged before Judge Ling.

The Court: Inasmuch as that matter has been disposed of, I do not propose to pass on it again. In other words, I think Judge Ling's decision is the law of the case.

Mr. Neukom: I will pass that, then.

The Court: I have heard the motion for a continuance and the statements made in support thereof, and I'm not considering it in connection with the illegality of the prosecution, but only on the continuance.

Mr. Neukom: I will pass that, then. This article in the Bar Association Journal, I know, caused

considerable turmoil among attorneys because we received quite a few [20] calls, but I am confident that if the Act is read and with the support of the cases that come under it, it will be very clear that there is not a case holding that an attorney cannot represent an enemy alien in either criminal or civil proceedings when he was living here prior to the enactment of the War, in any matters with which he might be confronted. What gave confusion to this particular article—in all respects, I think the man was wrong—is that that Foreign Registration Act of 1938, as amended, and is to be found in the United States Code Congressional Services of 1932, Edition No. 4, a rather lengthy Act, which has certain exemptions. I am not going to endeavor to interpret it at this time, but I think a reading of this will clearly indicate that it was the aim of Congress, in passing this, that a registration must be had with the Attorney General as to people who were representing enemy alien agents, so that the government could at all times——

The Court (Interposing): Enemy alien agents?

Mr. Neukom: Yes, enemy aliens or agents of——

The Court: It is only agents of the foreign governments.

Mr. Neukom: That seems to be the purpose of this Act, but even this Act states if you are going to represent those people, it doesn't prohibit you, it states you must file with the Attorney General a registration, and it is very clear in saying to you what you must inform the Attorney General of, and Mr. Lavine has apparently not done that, and the

Act was [21] passed in April and it was approved on April 29, 1942, and I don't believe it has any application to the proposition that is before us; but if your Honor will examine the Act, it is very clear that it gives Mr. Lavine the right to—it has certain exemptions, but it gives Mr. Lavine the right to inform the Attorney General of his client and to comply with all of its provisions. Since we approach this proposition in regard to a motion for a continuance in the matter, of course, the man is entitled to a fair trial, but this Court has not been told at any time or informed in any wise as to whom this defendant wants as a witness and how he is prejudiced by not having him here. These are busy times and to keep continuing cases, and spending money on these witnesses without an adequate showing in that regard to the Court, I think is not a well founded motion.

The Court: I don't think this Act applies because it says, "the term 'person' of course includes any individual, various members of government or various members of political parties (reading further in the Act)." I don't think that that includes, so far as any accusation has been made against this defendant—I mean there isn't any knowledge on the part of the Court in this case that this defendant is a foreign agent, that is to say, he is going or acting as an enemy of the United States. I don't think he would have to register under that Act at all.

Mr. Neukom: Neither do I, at all. I don't think he [22] would.

The Court: But I also learn that just because something had not yet been decided was no reason that the point wasn't good.

Mr. Neukom: That is very true. I don't urge that, but it is rather significant——

The Court: It is singular that the point was not raised during the last War, that is according to the reported decisions. I think, in view of the fact you have sent your telegram—of course, what Mr. Lavine is interested in is two things, as I see it; one is a disclaimer on the part of the Attorney General that they do not claim he has to have a license. I don't think your telegram is clear in that respect.

Mr. Neukom: I will send another one.

The Court: And the other one is that the Treasury Department should make some reply. I think he is entitled to know whether or not they will release the funds to him or deny the funds to him.

Mr. Neukom: Now he has the funds. I never asked him as to the amount. The funds are impounded. Mr. Di Marzo cannot obtain them. They are secure there. I told Mr. Lavine I would do everything possible to assist. I didn't want to ask him what he wanted as a fee, because I thought it was none of my business, but I told him if he wanted to [23] tell me what his fee was to be, I would have our offices write to the Federal Reserve Bank and urge that fee and that his request was reasonable that they release that money to him.

The Court: Well, I don't know that the United States Attorney is in a position, and I don't think I would be in a position to suggest that you take

any action as to how they should act. The only thing I am suggesting is that the United States Attorney can ask them.

Mr. Neukom: It is obvious at this time I cannot ask the Federal Reserve Bank to properly respond by tomorrow. I think that such a matter should have been called to this Court's attention a little while back. Now, Mr. Lavine talked to me a couple of weeks ago and I think told me he had some money——

Mr. Lavine: No, I talked to you when I returned from San Francisco last week. I was in San Francisco a week ago last Friday and I returned on the following Monday and I talked to you that day.

Mr. Neukom: We are confronted with an additional practical proposition. As the Court has pointed out, this man has known ever since April that he had a complaint against him. It is true the indictment was not filed until July 1st of 1942, but people are—even enemy aliens are obtaining moneys, any reasonable amounts from that which they have, and I do not believe that there is an adequate [24] showing before this Court that every effort has been made to try to obtain some moneys to pay his counsel fee.

The Court: Well, I am not concerned with him getting the money. That is not a concern of this court, but in connection with this matter, I think he is entitled to a reply from whoever, or from whatever governmental agency has charge of the matter. They can either refuse it or deny it. Of course, Mr. Lavine might get himself in an anoma-

lous position, for if it is refused and I should appoint him to defendant the defendant as an indigent——

Mr. Neukom: I asked Mr. Lavine to tell me what bank he was dealing with before he went up to San Francisco. I told him I would do everything I could. As you have pointed out, your Honor, I was not to assume or to suggest to the Federal Reserve Bank what they should pay, but the fact is that he has received the money.

Mr. Lavine: Not with the consent of any governmental agency, but with the consent of the bank letting me enter the bank, and the governmental agency stated it would be at the risk of the bank and they would have to take their own responsibility, and in view of that, I have no concealment of the amount received or the amount to be received. There was a thousand dollars in the box, and they allowed me to take \$500, and there is still another \$500 there which they will permit me to remove.

Mr. Neukom: May I assume to follow the analogy: Let's [25] assume that a robber had 20 or 30 thousand dollars that he robbed from a bank, and he walked into an attorney's office and gave him \$10,000 and that it was a partial receipt from the bank robbery. It is very true that an attorney, in accepting that \$10,000, might ultimately be confronted with the proposition that he had to return it because it was stolen money. Now, that problem as to trying to tell a government agency that they are going to give Mr. Lavine a complete immunity, as your Honor fully knows——

The Court: They cannot do it.

Mr. Neukom (Continuing): ——is something we cannot obtain. Now, all we can obtain from the Attorney General is an assurance that he does not need to have a presidential license, or a license to represent this man here, with regard to the Act of 1917. I think if you obtain that, Mr. Lavine, that that is the answer.

Mr. Lavine: Whatever I can obtain.

The Court: If the answer is that he does have to have a license, obviously the trial cannot proceed tomorrow, and if we have the information that he does not have to have a license, I think the trial can proceed and that the jury can be instructed not to come back until 2:00 o'clock tomorrow and we will be able probably to go to trial at that time if the Attorney General so advises either Mr. Lavine or the United States Attorney that in their opinion at the present time Mr. Lavine does not require a license. [26]

Mr. Neukom: I will state to him, and I think I am authorized to do so, that Mr. Lavine is assured immunity from our office.

The Court: Well, whatever your assurance is worth. After all, you are speaking as a governmental agency. We will continue this until 2:00 o'clock tomorrow and by that time you will have some word from the Attorney General.

Mr. Lavine: Now I make this statement to the Court on various matters that I read and I did not testify as to those. If Mr. Neukom would stipu-

late that if I were sworn I would so testify, or if not I will take the stand and testify.

Mr. Neukom: That is not required, Mr. Lavine. Whatever you have assured this court you have done in good faith.

The Court: It is so stipulated?

Mr. Neukom: So stipulated.

The Court: Now you had one other matter.

Mr. Lavine: One matter that your Honor said was the law of the case, but before we go into that I wanted to merely state this fact that I renew my objection at this time so that my record is clear.

The Court: On the additional grounds?

Mr. Lavine: On the additional grounds: We object to the jurisdiction of the Court to proceed because this defendant is at the present time interned in an enemy alien camp and cannot receive a fair trial under those circumstances, [27] which is guaranteed by the Fifth Amendment to the Constitution of the United States, nor can he receive an equal protection of the laws which that amendment authorizes to all persons residing in the United States or who come to trial within the United States.

Your Honor can very well see that a person who is so confined does not have the same rights as all other persons who are admitted to bail, and this defendant furnished bail and was taken off of bail. He did not have and does not have the same right of constitution.

The Court: He was on bail only one day.

Mr. Lavine: One day.

The Court: I think you said the bail was \$2,500 and some time later it was increased to \$10,000.

Mr. Lavine: Yes, he was released when the \$10,000 bail was furnished.

The Court: Was that before he was in the internment Camp?

Mr. Lavine: No, then he was taken to the internment camp and that bail was increased.

The Court: Well, let's see, April 7th he was first taken into custody. On April 5th he surrendered, on April 6th he furnished bail and the next day he was taken into custody as an enemy alien, is that correct?

Mr. Lavine: That is correct.

The Court: And put in San Pedro? [28]

Mr. Lavine: Yes, but the bail was raised from \$2,500 to \$10,000.

The Court: At that time?

Mr. Lavine: At that time. But as he was furnishing the \$2,500 bail, or immediately thereafter, the same day, it was increased.

The Court: Oh, I see, and he furnished the \$10,000 bail?

Mr. Lavine: Yes, he furnished the \$10,000 bail. And that bail has been available so that he could go out on bail as far as this charge is concerned any time he might have been at liberty to do so.

The Court: But he has at all times been in the custody of the United States Government?

Mr. Lavine: That's right.

The Court: As an enemy alien?

Mr. Lavine: That's right.

Mr. Neukom: Being detained by the Immigration authorities.

Mr. Lavine: That's right, and since our last hearing before Judge Ling, there has been an order, I have been informed, I don't know this of my own knowledge, that he be interned for the duration of the war.

Mr. Neukom: I will be very happy to read the extent of that.

The Court: I suppose it will be stipulated that he has had a hearing, is that correct? [29]

Mr. Neukom: He has had a hearing before the Board.

The Court: And the decision of the Board is that he was to be interned during the duration.

Mr. Neukom: The Board recommended it and the Attorney General, on August 12, 1942, approved the finding of the Board and ordered that he be interned, but telegraphed us on August 17th that he was not to be actually interned until the conclusion of this criminal proceeding but that he should remain in the custody of the immigration officers.

The Court: Well, you spoke a while ago about the Court being probably busy. Why should we proceed with the trial of this man if he is to be interned for the duration of the war? Why can't we go on with other matters that are waiting?

Mr. Neukom: Your Honor, that is not a matter that I have the conclusion or decision on. I have been requested to try this case. I didn't start the

case. Mr. Lazarus did, and I have been instructed to proceed now.

Mr. Lavine: I think that matters of this kind should be continued until after the duration of the war. It would not only insure justice in this case which I do not feel the defendant can receive whether innocent or guilty, but there are some things we cannot keep away from juries, but the ends of justice will be met as far as deportation proceedings are concerned.

The Court: I suppose I am not making this as a sugges- [30] tion to either party, but the Government is interested in the preservation of the testimony of the witnesses while the events are fresh in their minds. I don't know how long they remain fresh in that kind of a case.

Mr. Neukom: I have eliminated a few of them because I think they have not remained fresh or as fresh as they were in 1941, the day this crime was committed, if at all before we entered the war.

Mr. Lavine: January 24th, that's right.

The Court: Well, I don't know, I suppose the defendant would want to preserve the testimony of his witnesses in the event the matter was continued and go on calendar, is that correct?

Mr. Lavine: Yes.

The Court: By depositions. Of course, it would take a stipulation on the part of the defendant to take the depositions of the Government witnesses or defendant's witnesses, and I suppose a stipulation could be entered into, and to protect the defendant in any and all his legal rights.

Mr. Lavine: Yes, your Honor, I will stipulate that that can be done.

Mr. Neukom: And the Court can take the matter under advisement, of course.

The Court: I have no disposition to try to control the presentation of the trial by the United States Attorney, that is their responsibility, but my responsibility is on [31] this side of the bench, but it seems to me as though all of us are charged with responsibilities now of keeping the courts open and free for the movement of matters of immediate and great concern which come into these courts now.

Mr. Neukom: I would be very happy to have Mr. Lavine go up to the office with me now and use his good graces and he can come back up in the morning and talk to Mr. Silverstein, and I will have the Immigration people present.

The Court: I don't know, I am just suggesting, certainly *now* with any implication that it should be done, that if the matter is continued that the testimony of all witnesses, the Government witnesses and their witnesses could be preserved by depositions, but at any rate the matter will go over until 2:00 o'clock tomorrow awaiting reply from the Attorney General.

Mr. Lavine: Now, your Honor, also as to the objections which we have made, which we might dispose of before we have the conference tomorrow morning.

The Court: That is the objection as to the form of the indictment?

Mr. Lavine: No, the objection to the jurisdiction of the Court.

The Court: You said there was some objection to the form.

Mr. Lavine: I have no objection to that.

The Court: State that objection now. [32]

Mr. Lavine: That the Grand Jury which was selected, and it may require some evidence unless we can stipulate as to the facts, was composed entirely of men, and does not conform to the provisions of Section 411, Title 28.

Mr. Neukom: I will stipulate it was all men.

Mr. Lavine: Will you further stipulate that there have been no women on the Grand Jury panel in the last two years?

Mr. Neukom: Not in the seven years I have been here.

Mr. Lavine: So that for a period of seven years there have been no women.

The Court: Which in my judgment is wholly immaterial. That is this Grand Jury you are talking about, Mr. Lavine?

Mr. Lavine: Yes, and that there have been no names of women in the panel itself. You will so stipulate?

Mr. Neukom: Yes, and not on the petit jury.

Mr. Lavine: I will accept the stipulation.

The Court: Very well, that is the stipulation as to that.

Mr. Lavine: Now, then, I move to quash the indictment on the ground it was returned by a Grand Jury composed not in accordance with the

composition of grand juries as provided by Title 28, Section 411, U. S. Codes Annotated, which requires that jurors in a Federal court, and grand juries be composed in the same manner as they are in the State courts in which the courts are located, and I think you [33] will stipulate, Mr. Neukom, that there are women selected on the grand juries and the state courts of the State of California, and there are women selected on the petit juries.

Mr. Neukom: I will, and your Honor takes judicial notice of it.

The Court: Your motion is on purely technical grounds, or on the ground that some prejudice resulted to your client?

Mr. Lavine: On technical grounds.

The Court: You are claiming no actual bias or prejudice to your client by virtue of the fact that it was a jury of men?

Mr. Lavine: I don't know whether it was biased or prejudiced.

The Court: I am speaking now of actual prejudice to your client by virtue of there being men instead of women. Do you think your client would have had, in other words, would have had a fairer hearing before a grand jury, or greater consideration by a grand jury which had been selected in accordance with the usage and customs in a state court, or had there been women on the grand jury?

Mr. Lavine: I don't know whether or how to pass on that, that is something we cannot prognosticate, the degree of fairness, but my objection is based on non-compliance of the statute.

The Court: I will rule on the matter tomorrow.

Mr. Neukom: May I state two cases on one point, the [34] case, the Ballard case——

Mr. Lavine: And Glasser vs. United States, an Illinois case and the opinion written by Judge Murphy.

(Thereupon at 12:12 o'clock p. m., September 9, 1942, an adjournment was taken until 2:00 o'clock p. m., September 10, 1942.)

Los Angeles, California

Thursday, September 10, 1942

2 P. M.

The Court: United States against Joseph Di Marzo.

Mr. Neukom: Ready, your Honor.

The Court: Ready for the Government?

Mr. Neukom: Yes.

The Court: Ready for the defendant?

Mr. Lavine: No, your Honor, on the ground set forth, and continuing that matter, I think Mr. Neukom has some dispatches.

The Court: As this question is unsettled, I will deny that on the ground—or you might have your record, Mr. Lavine.

Mr. Lavine: May I complete my record on the first question?

The Court: Very well.

Mr. Lavine: In connection with the ground, that I have not had a full and fair opportunity to prepare and present the defendant's case upon proper consultation with him, and that this defendant is

thereby deprived of essentially the [35] rights granted under the Sixth Amendment of the Constitution of the United States. I wish to present these particular facts, and if there is any question about that, I think we can probably enter into a stipulation.

The Court: Are those in addition to those already stated?

Mr. Lavine: Yes, in addition to those stated yesterday.

The Court: You wish to present the facts which you stated yesterday?

Mr. Lavine: No, those are already in the record. I wish to state additional facts, because we adjourned at 12:00 o'clock yesterday.

The Court: You want to preserve those facts as well as additional facts?

Mr. Lavine: I want to preserve all the facts stated and to which we entered into a stipulation yesterday, and these additional facts: That at the session at which we last appeared, Judge Ling was sitting in this court prior to your coming into this court, your Honor——

Mr. Neukom (Interposing): August 8th.

Mr. Lavine (Continuing): ——and at that time, Mr. Neukom, as Assistant United States Attorney, stated that he would aid in facilitating proper consultation and conferences in the matter of attorney and client, between my client and myself. And he further stated that at any proper time that we desired to have Mr. Di Marzo brought to Los Angeles from [36] the internment camp at

Tuna Canyon Station at Tujunga, a distance of about 20 miles, that a request of the Immigration Department would bring about cooperation, and that I could confer with him in the grand jurors rooms, if I so desired, in the Federal Building. That is correct, isn't it, Mr. Neukom?

Mr. Neukom: I so said.

Mr. Lavine (Continuing): And in furtherance of that matter, that he could not be brought to my office nor taken to any other place, that proper mode and means of conference and consultation would be permitted under the circumstances I have narrated, also that I would be permitted to talk to Mr. Di Marzo privately at this place, and also that, if I went to the camp, I would be permitted private consultation, and if I desired to talk to him on the telephone, that that would be private.

The next day I called the Tuna Canyon Station and I asked the officer in charge there, I talked to him and asked for an opportunity to talk to Mr. Di Marzo on the telephone. He stated that I would be permitted to talk to him on the telephone, but he wished me to know that all conversations were attended by an extension telephone, and that anything that I said would be listened to, and everything that Mr. Di Marzo said would be listened to, and further that he had the responsibility of having charge of this Immigration Station and of all persons within it, and that was the func- [37] tion which he had to do in a manner in which he felt was for the best interests of our Government, regardless of any individual case, and that in so far

as Mr. Di Marzo was concerned, he was in no other category than any other person who was confined there and that they intended to listen to all conversations on all matters that went on there for the protection of their jobs, and the protection of the United States.

I told him I could not differ with him on the question of principle, but I felt, under the Constitution, I had a right to talk to my client privately. I went up there on various occasions, but when I requested that he be brought down here for any conference, I was also informed that that would be impossible. I asked that he be brought down here for conferences, but I was informed that that would be utterly impossible, that they did not have the facilities, nor the men, nor the opportunity to bring him down, and that if I desired any conferences or conversations I would have to go to the Tuna Canyon Station myself and confer with him there, and there alone, although the United States Attorney's office had requested that I be given these rights, that they did not feel that they could, under their particular situation accede to them. I therefore made possibly as many as eight, and it might have been even ten trips to the Tujunga Station and talked to Mr. Di Marzo there. I was afforded an opportunity to talk to him first out in the [38] detention yard, or on the porch of the yard with an officer watching, and observing everything. I don't know, I can't say that he heard anything, I can't say that he did or he didn't. I tried to make my voice and my conference private, but the

place is so constructed that the voices carry, and I don't know whether it is wired for sound or that they heard everything of everybody or not, but as far as I know we were permitted to talk alone, to talk and confer about our case in a room inside of one of the buildings without the hearing, at least possible hearing of any officer although persons were in attendance at different parts of the place.

The Court: How big was the room, about as big as this room?

Mr. Lavine: Oh, no, not as big as this. A square of this particular bench would be about the size of the place of the conversation in the room, and there is a screen in the room between this room and another room on the other side where there are persons present, and I don't know that any of our conversation was heard or overheard by anyone, I couldn't say for a fact, your Honor, but I can say that those were the conditions under which I had to hold my conferences and consultations, and the times which I had to hold them were there at the Immigration Department and I couldn't go up in the daytime during the time I had court proceedings and business here in the city to attend to, so [39] I went there in the evenings, and they permitted me to see him in the evening, and as to the hours, they furnished me accessibility to him in that respect, and in this manner they were cooperative, but they were under circumstances that I certainly do not feel that any other person charged with crime, even of the most serious crime of mur-

der, is confronted with in this country, and we have therefore a duty to perform in so far as persons who are charged with offenses, who happen to be foreigners, a duty to set a high standard for those persons of other countries who were confronted with the problem of Americans in their own country so that they might do likewise, and I do not feel that, under the circumstances I had as much opportunity to prepare even as Mr. Neukom would have liked to have had me do at the time when we had this matter in Judge Ling's court, at which time he personally and fairly and properly asked that the man be brought here for conference as the occasion might require, and these are matters as to the particular facts that I have stated. If Mr. Neukom will stipulate as to those facts or if he wants to put the Immigration Officer on, he may do so, or I will swear to this statement of facts.

Mr. Neukom: I wouldn't be in a position to stipulate entirely to your facts because I conceded before Judge Ling and made a suggestion that he be accorded a chance to talk to Di Marzo down here, but I was informed that I was exceeding [40] my authority and that he was detained by the Immigration people and that they could not bring him down unless they were subpoenaed, and their regulations forbid them bringing him down except in a court proceeding.

The Court: How did he get here?

Mr. Neukom: By subpoenaing Mr. Del Gurcio to produce him.

The Court: Was he brought here today on a subpoena?

Mr. Neukom: A subpoena was issued for the reason that if this man should escape, he would be under process of court in producing the body of the man here in this trial. I promptly told Mr. Del Gurcio the situation and I said "You must accord Mr. Lavine a chance to talk to him in a room which is suitable and large enough so that a guard can be at the far end of the room at the door, and he shouldn't listen or attempt to hear anything that was said", and I can say this truthfully that we have no evidence, none at all, there has anything come to our attention that has happened out there. We know of nothing that has transpired and will offer no evidence of anything that has been said, because we know of nothing that took place out there. We feel that he has had the same rights with counsel that he would have had if he were in the county jail, and as you know the attorney's room there is nothing more than several benches.

The Court: I know what it is.

Mr. Neukom: And parties are sitting side by side and [41] can overhear everything that has gone on and we have given him far, even farther latitude than is accorded there and accorded in many jails, and have requested that anything at all that he would require in connection with his case, if he would let it be known to us that we would endeavor to provide it for him. Mr. Lavine at no time requested that I bring him to the grand jury room. Two weeks passed by without any such re-

quest coming from Mr. Lavine, whereupon I called Mr. Lavine and told him I understood he couldn't be brought down, and he said he knew that anyway, he found that out at the station so there was no necessity of him requiring me to bring him down here. The man has had the same chance that any other person would have to confer with counsel. A showing such as this, without being fortified with reasons whereby he has been prejudiced, and where he does not show specifically to the Court where he has been prejudiced by inability to secure testimony or witnesses, to my opinion comes rather late, and additionally, Mr. Lavine hasn't even told your Honor anything that he feels he has been deprived of, at least in defending this man. We know that frequently we used to keep federal prisoners down in Orange County and people had to go all that distance to confer with them and unfortunately we cannot regulate where they are. They are not in our custody.

The Court: Do you have anything further?

Mr. Lavine: I wanted to swear to those facts as being [42] true.

The Court: Mr. Neukom, you will stipulate that if Mr. Lavine were put under oath he would testify in accordance with his statement on this matter?

Mr. Neukom: So stipulated.

The Court: I think the motion made on this ground should be denied for two reasons: In the first place, there isn't any showing of any prejudice, no showing of anything which might have

been accomplished had the situation been otherwise, number one and number two. I think he has had a reasonable opportunity to prepare and to consult in reasonable privacy concerning all of the factors that are involved.

Mr. Lavine: May an exception be noted?

The Court: Very well.

Mr. Lavine: Before we leave this motion as to the question of prejudice, the degree of prejudice that a prisoner suffers by reason of his failure to have ample opportunity to confer with counsel is one that cannot be demonstrated at this time or stage of the case. The very fact that he is denied that constitutional right is a prejudice that exists there. Supposing that an accused has no opportunity to have counsel at all.

The Court: It is quite different than that. I mean he did see you.

Mr. Lavine: He saw me eight or ten times.

The Court: And in your statement yesterday, you have [43] prepared as well as the circumstances would permit, and you have prepared——

Mr. Lavine: I have prepared as such circumstances would permit, but not as well as I would like to have prepared had the defendant been granted the same rights as any other person who is detained, as any citizen or subject of this country.

The Court: Of course, we cannot prepare carpeted rooms or plush chairs for prisoners to consult their counsel. Of course, I think they ought to be provided with counsel.

Mr. Neukom: He did have a chair and a table.

Mr. Lavine: The difficulty is this, your Honor, that in so far as a person who is in a situation such as this defendant, but who has posted bail and who has an opportunity to go out under bail, which our Constitution allows to any person accused of crime, he can make his own investigation and find his own witnesses. He may know facts that even an attorney or investigator cannot know.

The Court: The man has to show some reasonable probability and not simply "you know if I had a chance I could have found some witnesses". I use that for illustration, and he has to show, if he had a chance to be in New York he has a reasonable probability to believe or some other reason that he could have along that line, something which is a fact, and no such showing is made at any rate.

Mr. Lavine: We are confronted with this situation. [44] There will be testimony offered by the Government, as I understand, in this case, that the woman involved was with somebody else at the time she left for the ship going to Honolulu. Now I don't know, nor neither does my client know the name of that particular person, as that name now exists, because these people seem to have had different names at different times, but an investigation can be made. I could not uncover it but possibly he himself could uncover that name and location of the party's whereabouts.

The Court: There has to be more of a showing than a mere possibility.

Mr. Lavine: We know that such a person is a material witness in this case.

The Court: How do you know what he will testify to?

Mr. Lavine: We know he would testify to the facts.

The Court: The motion is denied on that ground.

Mr. Lavine: Exception noted. I wish to make a second motion; that we have a continuance on all of the grounds heretofore set up in our previous argument. I don't think your Honor has ruled on those, we continued it over.

The Court: Except this one specific thing. Now do you wish to make a separate motion on that?

Mr. Lavine: On the question of "trading with the enemy act"?

The Court: You are making this motion on the other ground you stated yesterday, that is the legal ground. [45] Your motion is denied on those grounds.

Mr. Lavine: May an exception be noted?

The Court: Very well.

Mr. Lavine: And the third objection is that the defendant, by reason of the "trading with the enemy act" sub-divisions 2 and 3 thereof, although he has means to pay counsel, and means to pay for the cost of his services, he is unable to do so by reason of the fact that his counsel, if he proceeds, could be liable under the "trading with the enemy act" of trading with the enemy.

The Court: Without a license.

Mr. Lavine: Without a license, and that he has applied for a license and that there has been no answer to his inquiry, and there has also been teletypes between the Attorney General's office and the Deputy Attorney General in charge of this prosecution, Mr. Neukom, and which as yet have not been answered effectively so as to assure counsel that he is in the clear in acting in the defense of this man and that he is not trading with the enemy in accepting a fee and defending him.

The Court: It is stipulated you have in your possession now the sum of \$500 which was obtained from a safety deposit box?

Mr. Lavine: So stipulated.

The Court: After his filing an application but without any action on their part formally to you?

[46]

Mr. Lavine: That's correct.

The Court: All right. The motion on that ground is denied, on the ground that the "Trading with the Enemy Act" does not comprehend a Presidential license for a contract involved between an attorney and client in defense of a criminal matter wherein the United States is the prosecutor.

Mr. Lavine: And that Act also does not apply to an attorney except in a fee.

The Court: Well, it doesn't apply to an attorney at all. You can't be trading with the enemy.

Mr. Lavine: Now, may an exception be noted to that?

The Court: Very well.

Mr. Lavine: Now the third motion.

The Court: I examined the law in that action, the Glasser case, and as soon as I saw it, I remembered the matter. I don't think that that is applicable here because as I construed the Illinois statute it was mandatory, and although they said it was mandatory, they said it had not been in effect long enough prior to the empaneling of the grand jury to permit an opportunity to have excluded women and no prejudice was shown or attempted to be shown and moreover on the further ground that as stated in *re Ballard*, and I think some other District Court opinions here, that it is not mandatory that women be included in the panel. So that motion is denied and your exception is noted. The Court will call the roll of the jury. [47]

We will take a recess until tomorrow morning at 10:00 o'clock, but in the meantime you are admonished not to discuss this case among yourselves nor to offer or express a conclusion to any person concerning any of the matters or things at issue in this trial or which have transpired in the court room.

(Whereupon at 4:30 o'clock p. m., September 10, 1942, an adjournment was taken until Friday, September 11, 1942, at 10:00 o'clock a. m.)

Mr. Lavine: At this time, your Honor, we renew the motion which was made with reference to the Grand Jury and with reference to Petit jury, that is to say, that there were no women on the Petit jury panel from which this jury was impan-

eled and that there have been no women on the panel for the selection of this jury, and further that the procedure under Section 411 of Title 28, U. S. Codes Annotated, provides for the same jury selection as exists in the courts of the State in which the court is located.

The Court: The matter has been ruled on.

Mr. Lavine: As to the Grand Jury. Now, if Mr. Neukom will stipulate that the same stipulation we had with reference to the Grand Jury may apply to the Petit jury and that motion may be deemed renewed as to all objections and all rulings with reference to the Petit jury we made to the Grand Jury, I will accept the stipulation and the ruling [48] of the Court as a part of this record so that I may preserve my record.

Mr. Neukom: I stipulate and abide by the ruling of this Court and other courts in that regard.

Mr. Lavine: I accept the stipulation.

The Court: My ruling is the same on the renewal of your motion.

Mr. Lavine: As to the Petit jury?

The Court: Your motion before included both the panel of the Grand Jury and the Petit jury, as I understood. My ruling is the same and the same grounds.

Mr. Lavine: Exception noted. [49]

JOUBERT BRYAN HURD

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

(Testimony of Joubert Bryan Hurd.)

Direct Examination

By Mr. Neukom:

I have appeared here in response to a subpoena served upon the Matson Navigation Company. I am not acquainted with Joe Di Marzo, nor with Miss Beverlin, also known as Mrs. Judith Bradford. I have never seen them, as far as I know. I have produced records of the Steamship Company pertaining to the sailing or the transportation afforded to one Mrs. Judith Bradford on the SS Lurline on or about January 24, 1941. This is the original ticket checked in by the purser of the steamer and the original berth list produced after the voyage is completed. This is the only record of that matter.

(It was here stipulated that the Government may introduce photostatic copies in place of the originals and the originals may go back to the company—reserving any right the defendant may have to object to the documents.)

(A one way cabin class contract ticket No. 56066 was marked for identification as “Government’s Exhibit No. 1.”)

(A berth list of the SS Lurline, sailing January 23 and 24th, cabin class was marked for identification as “Government’s Exhibit No. 2.”) [50]

By the Witness:

Government’s Exhibit 1, for identification, is a photostatic copy of the ticket for the party whose name appears upon the ticket. Upon Government’s Exhibit 2, for identification, the berth list, I find

(Testimony of Joubert Bryan Hurd.)

the name of Bradford, in Room 406, Berth "D".
That refers to the Lurline.

Mr. Lavine: I object to all this testimony, as irrelevant, incompetent and immaterial at this time and subject to any reserved ruling that your Honor may make as to connecting it up.

The Court: Well, I will overrule your objection and your motion to strike that which has been testified to so far, giving you the right to renew your objection and motion in the event it is not connected up.

Mr. Lavine: Note an exception.

By the Witness:

The name and initials are Mrs. J. Bradford.

Mr. Lavine: May I have a general running objection to this particular testimony with the understanding I do not have to renew my objection to every question that he may ask?

The Court: You say your "objection". What is your objection?

Mr. Lavine: My objection is that there has been no foundation laid and it is irrelevant, immaterial and incompetent at this time.

The Court: The objection is overruled and it may be [51] deemed that you have objected to each of these questions and my ruling will be the same without repetition of it, if you so desire.

Mr. Lavine: Exception noted.

By the Witness:

Government's Exhibit 2 for identification is made before the beginning of the voyage and a final

(Testimony of Joubert Bryan Hurd.)

check is made by the purser during the voyage, and it is turned in as an accurate berth sheet at the end of the voyage. Any changes are made and indicated by the purser enroute. It contains many other names than the ones I have identified.

Cross Examination

I could not say whether I did or did not see anyone write any of these names on the berth list or on the passage contract. I possibly might have. I have supervised the work at the office and I couldn't say. I can't say now whether or not I saw anybody by the name of J. Bradford write the name on this passage contract. I can't say now that I could identify the person who wrote the name on that contract. I wouldn't be able to pick out the person who signed that name on the list. I myself didn't make up this berth list. I know of my own knowledge whether Mrs. J. Bradford went into room 406 or not. I was not on the boat. I did not see anybody by the name of J. Bradford go into cabin B of Section 406. As to whether I really don't know who occupied that berth on that trip, of my own [52] knowledge, well, our own knowledge goes to our official records.

Mr. Neukom: I object to further interrogation along this line because, obviously, the witness answered or has indicated he doesn't know.

The Court: Objection sustained.

Mr. Neukom: He is here merely to introduce records kept in the regular course of business.

(Testimony of Joubert Bryan Hurd.)

Mr. Lavine: Just a minute. I note an exception to your Honor's ruling.

By the Witness:

I know who else occupied that particular cabin of my own knowledge. I didn't see the other people. I didn't see them personally. The berth sheets are made up before the ship sails. These passage contracts are returned at the completion of the voyage. This particular ticket was a one way cabin class contract ticket. The price charged for this ticket was \$105.00. The rate on a roundtrip ticket is twice that amount. There is no reduction for a roundtrip ticket. In January the Lurline left from Pier 156, Wilmington. It left from San Francisco the day previous, but final sailing was from Los Angeles. Some of these people on this berth list got on in San Francisco, and some in Los Angeles. That is indicated at the top of the berth list, "San Francisco" and "Los Angeles Harbor". We check in all those that get on here. I can tell from this berth [53] sheet where they did get on. I have here records to show how the ticket was purchased, whether by cash or by check or otherwise.

Redirect Examination

By Mr. Neukom:

Originally Mrs. J. Bradford, according to our records, purchased a first class ticket. The price of it was \$150.00. A second class ticket, a \$105.00 ticket was what she actually sailed upon. There

(Testimony of Joubert Bryan Hurd.)

was a refund made to her of the difference between \$105.00 and \$150.00.

Recross Examination

By Mr. Lavine:

There were at that time two classes of sailings. She actually sailed on the lower class fare, at \$105.00. We returned to her the sum of \$45.00 January 23rd, the day of the sailing, or the day before.

KATHERINE FRANCES MARION ANDERSON

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crawford:

I know Joseph Di Marzo. I have known him since October or November of 1940. I know Judy Bradford, also known as Helen Merle Beverlin. I met her shortly after the holidays, in the early part of 1941. [54]

Q. Now, what was your business or occupation before your present confinement in the county jail?

Mr. Lavine: Just a minute. I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Lavine: Exception noted.

(Testimony of Katherine Frances Marion Anderson.)

The Witness: I was running a house of prostitution.

Mr. Lavine: I move that the answer be stricken as prejudicial to this defendant and not within the issues of this case.

The Court: Motion denied.

Mr. Lavine: And no foundation laid. Exception noted.

By the Witness:

I was in the business of prostitution off and on since 1925.

Q. Now, speaking of being in the business of prostitution, what was your particular part in that business? Were you a proprietress or what is commonly known as the "madam" or were you one of the girls?

Mr. Lavine: I object to that as incompetent, irrelevant and immaterial and not within the issues of the case and it is prejudicial misconduct.

The Court: Objection overruled.

Mr. Lavine: Exception noted.

The Witness: Well, I was the proprietress of the place.

Q. By Mr. Crawford: Now, as such, did you have working [55] for you or under your supervision a number of girls?

Mr. Lavine: Objected to as irrelevant, incompetent and immaterial and not within the issues of this case and it is prejudicial misconduct. I ask the jury be instructed to disregard the answer.

The Court: The objection is overruled.

Mr. Lavine: Exception.

(Testimony of Katherine Frances Marion Anderson.)

By the Witness:

I had a number of girls at various times, but only one at a time though.

Q. By Mr. Crawford: Miss Anderson, I will ask you if, during the year of 1940, when you were conducting the business of prostitution, were the girls or girl sent to you by anyone or did they apply directly to you?

A. No, they were sent.

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial and not within the issues of this case and is tending to establish some other offense or offenses relating to some other person and not as to this defendant and certainly the only issue here, your Honor, is related to one girl who is alleged to have been transported, and we certainly object to whether this woman had——

The Court: Transported for the purpose of prostitution.

Mr. Lavine: Yes, to Hawaii. But we have here a question asked about several girls and not this girl, and not related to this defendant, and I certainly object to any asking of [56] these questions as prejudicial.

The Court: Overruled, without prejudice to your right to make a motion to strike in the event it is not connected up.

Mr. Lavine: Exception noted.

By the Witness:

Since the latter part of 1940—I think it was

(Testimony of Katherine Frances Marion Anderson.)

November, the girls I had working from then on were sent to me by Joe Di Marzo. During that period of time Judy Bradford, also known as Helen Merle Beverlin, was in my employ as a prostitute. She was sent to me by Joe Di Marzo.

Q. By Mr. Crawford: Miss Anderson, during the time that Judy Bradford was employed in your establishment as a prostitute from whom would she collect for services rendered or who would collect the money for services rendered?

Mr. Lavine: Now, just a minute. I object to that as too vague and indefinite, possibly calling for a conclusion of this witness.

The Court: Objection overruled.

Mr. Lavine: Exception.

By the Witness:

Judy Bradford collected from the customer. At the end of the evening she would come into my apartment and give me half of the money which was my share, and if it were all but \$10 for each half I would get 10 per cent more for maintenance, meaning towels and janitor tips and a few other things. [57] She would keep her half and I would get half.

Q. By Mr. Crawford: Now, do you know of your own knowledge whether or not Judy Bradford divided the money that she had received from various customers at times while in your employ with anyone else other than you?

Mr. Lavine: Objected to as calling for the conclusion of the witness.

(Testimony of Katherine Frances Marion Anderson.)

The Court: The objection is overruled. The question calls for a "Yes" or "No" answer.

The Witness: Yes.

By the Witness:

She gave her money to Joe Di Marzo. I know of one instance. It was the early part of January, 1941, at my apartment at 751 South Normandie. This is the only instance I know of, and it was an odd amount. It was \$17.25. That is why I remembered it so definite. That was in my presence, in my apartment.

In the early part of January 1941, I had a conversation with the defendant in my apartment. There was Judy Bradford, my nurse, Miss Slover, and a girl named Renee, who since I have found out her name is Joan Day, Joe Di Marzo, myself. There was another couple there, but they had left at the time of the conversation. There were quite a few things said. Joe Di Marzo brought this girl Renee up and told me on the 'phone that he wanted me to meet his new girl. Judy at the time was working for me, but she was working in a different [58] apartment in the same building. I had two apartments, one I lived in and the other one that the girls used for their business. We had a 'phone in each apartment. When I wanted her I would call her. So Joe Di Marzo 'phoned me a little earlier and said he was bringing this girl Renee up and he wanted me to meet her and to be sure to keep Judy Bradford in the other apartment; that she didn't know he had a new girl.

(Testimony of Katherine Frances Marion Anderson.)
They came in, and we had a couple of drinks. And finally he said, "You might as well bring Judy in." So I introduced the two girls.

He said, "I want you to meet your new sister-in-law." So there was a little more conversation, nothing specific; and then he came over to me and he says, "You know, you are going to lose Judy."

I said, "Why?"

"Oh, I am going to send her to Coney Island."

I said, "What in the world is Coney Island?"

He said, "Honolulu, you dope," or something like that. He said, "I am going to send her over there. She is not making enough money here, and the girls over there are making approximately a thousand a month, and she is going to take Dolly with her," Dolly being another one of his girl friends. So I didn't like it very well. Judy was a very good girl, and I was a little bit peeved about it. I didn't want to lose her.

Well, we were sitting around there. And I asked him— [59] I said—well, I said something about Dolly: "I don't care much about having her work." He said, "No. She's going to the Island too."

"But", I said, "who are you going to send up?"

He said, "I will find you someone pretty nice."

The nurse I spoke of was attending me. I was confined with a broken leg at the time.

After that conversation Joan Day did not go to work for me. I didn't think she was quite experienced enough. About June 1, 1941, I met and

(Testimony of Katherine Frances Marion Anderson.)
had a conversation with Judy Bradford. Judy in the latter part of May was working for me again, and on Decoration Day, 1941, she was supposed to come to work, and Mitzi Bruno came downstairs from the apartment house where I was supposed to pick her up and said Judy was laid up with a broken jaw, couldn't come to work. I next saw Judy in the hospital, I think, two or three days later.

I had a conversation with the defendant in the latter part of June 1941 at Joe Di Marzo's home on Garland Street. Judy Bradford was present besides myself and Mr. Di Marzo.

Q. By Mr. Crawford: The conversation, Miss Anderson: relate the conversation that was had at that time and place which you previously testified to relative to any discussion had with the defendant regarding Judy Bradford's trip to Honolulu in the early part of 1941.

Mr. Lavine: My objection, your Honor, is that it is [60] too remote, this conversation several months afterwards.

The Court: Objection overruled.

Mr. Lavine: Exception.

By the Witness:

I asked him why they were arguing. He said the trouble started in Honolulu; that Judy didn't bring back the amount of money; that he had suspected that she had been running around in Honolulu. So I asked him, What about the \$500 worth of Traveler's check he was holding? He said that

(Testimony of Katherine Frances Marion Anderson.)
he was going to keep them because Judy hadn't been behaving herself, and he was going to hold them and not let her have them. I think that is about all.

Mr. Lavine: If your Honor please, may I make a motion to strike all of this last testimony as being too remote?

The Court: Motion denied.

Mr. Lavine: Exception.

Cross Examination

I handled prostitutes. I was one myself. I was not engaged in prostitution myself at the time that I had Judy Bradford as one of my prostitutes. I had other girls, though, from time to time. Judy was one of my very best. The customers seemed to like her better than most of the rest of them. As to whether I never had any trouble having her earn as much or more than any other girls I had—the earnings would be approximately the same because we only had a certain volume of business. I liked her and wanted her to [61] stay. I wanted her to stay in January of 1941. I hated to lose her because she was one of my best girls. She would earn during the month of January 1941, anywhere between \$15 and \$20 a day. She was earning that during the time she was there. That is net. That was her share. The gross would be \$35 to \$40, \$42 a day. I never saw her give any of this money to Mr. Di Marzo at any time, except on this one occasion that I spoke of. On that particular occasion, there was present this

(Testimony of Katherine Frances Marion Anderson.)
couple that Joe Di Marzo brought in. I think the man is a bail bondsman. His name is Nelson. There also was present Renee, or Joan Day, whatever her name is; I don't know. I know it is Renee. I just met her that night. She is not a girl that works out in one of the night clubs. In January of 1941, I had this conversation at my apartment at 751 South Normandie. I think there just had been one drink served. A highball; by that I mean whiskey and ginger ale. My nurse wasn't drinking, being on duty. And I had one drink. During the course of the evening, I think I had two more. I wasn't allowed to drink very much at that time. I was in bed with a broken leg, and it isn't the best thing in the world. I saw Mr. Di Marzo come in. At the time he came in Judy was in the other apartment. Mr. Di Marzo came in with Renee.—Joan Day. I didn't know that Judy was engaged to Mr. Di Marzo. When Mr. Di Marzo came in with this other girl approximately ten minutes after that, Judy came in. She saw [62] him then with Joan Day. She didn't strike at him. She went in the kitchen and cried, I believe. I couldn't see quite that far. It was the early part of January. It was on that night that she gave him \$17.25. She gave him the money the minute she came in. And then she went out and cried. He was with Joan Day at the time she gave him the money. Judy was going to stay up there, and I gave her a key to the other apartment. We only had two beds in my apartment,

(Testimony of Katherine Frances Marion Anderson.)
and my nurse slept in one and I slept in the other. So I gave her a key to the empty apartment. Joe went out to get some more liquor—I think that was it, and didn't come back for a couple of hours, and Judy got tired and left. I next saw Judy Bradford in the latter part of May, 1941. Oh, I saw her the next morning at my place of business. She wasn't there all day that next day. She did not work for me the next day. She never worked for me again from that day until the latter part of May, 1941. I saw her some time in June or July of 1941. I saw her so many times during that time that I know it must have been during the last of June because we visited her at the hospital, and I saw her in July because she used to spend her afternoons at my apartment. She showed me a few pictures she had taken over in the Island. She did not show me some pictures of herself with some boy friends in the Island. She said they were taxi drivers that had taken in the Island. I did not see the Traveler's checks. I [63] never saw the Traveler's checks. I never saw Joe Di Marzo with any Traveler's checks. I never saw him take any Traveler's checks from her.

Judy worked for me in the latter part of May 1941 for approximately a week or ten days. Then her jaw was broken and she was unable to do anything until July. She worked for me again during July of 1941, just in the afternoon for a couple of hours. She worked for me and received money from me. In connection with all these mat-

(Testimony of Katherine Frances Marion Anderson.)

ters that I have related, I was asked about them in the District Attorney's office in Los Angeles County. I know Mr. Phillip Tower, an investigator for the Los Angeles County District Attorney's office. I was not present in the District Attorney's office when Mr. Joseph Di Marzo was brought in. The only time I saw Joe D Marzo in the District Attorney's office was in, I think, Miller Levy's office. Miller Levy being a Deputy District Attorney of Los Angeles County. I think it was the middle of March, 1942. I don't remember the exact date. There was present at that time just Phillip Tower and Joe Di Marzo and myself. Miller Levy was in and out. I don't remember whether he was there at the time Joe Di Marzo came in. I do not remember at that time Mr. Di Marzo, in that place, with just me being present, that Mr. Di Marzo said he had heard me make some statements that he had taken \$500 from Judy Bradford after she had returned from Honolulu and it was not [64] true, and I said, "I never made any such statements". I do not remember that conversation. He didn't even mention \$500. I remember Joe and I having an argument in there. The subject matter of the argument did not start because I accused Joe Di Marzo of having caused my arrest. I did not state at that time "You are responsible for having me charged with the offense I am charged with, and I am going to get even with you." I pleaded guilty of contributing to the delinquency of Vicky Moore. I knew Vicky Moore first through Joe Di Marzo.

(Testimony of Katherine Frances Marion Anderson.)

Vicky Moore was the complaining witness against me. When I had this argument with Joe Di Marzo in that room on that occasion I did not ask him why Vicky Moore had brought this charge against me.

As to whether after Judy Bradford worked for me in May of 1941 she went to the Hawaiian Islands—I don't know anything about that.

Q. Didn't she leave to go to the Islands from your place?

Mr. Neukom: That is not a proper subject matter of cross examination, your Honor.

Mr. Lavine: It covers the period when she said she was having conversations and dealings with her.

The Court: Objection sustained. It is too remote.

By the Witness:

Mickey Moore testified against me at the preliminary hearing. [65]

Redirect Examination

By Mr. Neukom:

Mitzi Bruno introduced me to Vickey Moore.

Recross Examination

By Mr. Lavine:

As to whether I know that Vickey Moore had come to me from Joe Di Marzo—I had a conversation on the Telephone with Joe Di Marzo prior to Vickey's coming over there. As to whether I knew at the time that Vickey Moore was a witness against

(Testimony of Katherine Frances Marion Anderson.)
me,—that Joe Di Marzo was aiding the District Attorney's office of Los Angeles County—I heard that he was, I didn't know for sure.

GENEVA ANN SLOVER

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crawford:

I am by profession a Doctor's assistant. During the period of time from January, 1941, I was in the employ of Marion Anderson as a nurse. I know Joseph Di Marzo. At that time and place I had occasion to see Joe Di Marzo at the apartment of Marion Anderson. There was present Marion Anderson and Judy Bradford, and Renee, and also Joe Di Marzo. At that time I was on duty as a nurse. I was in the apartment, but in and out of the rooms. That apart- [66] ment has a bedroom other than a sitting room. At that time there was a conversation had between the defendant and Miss Anderson. I overheard Joe say he was sending Judy away. I was back and forth and I didn't pay any more attention. That is all I recall.

Cross Examination

By Mr. Lavine:

The others who were there that night were doing

(Testimony of Geneva Ann Slover.)

quite a lot of drinking. I couldn't tell you how many they had. But they were drinking quite a bit, and there was quite a bit of noise there that night. I don't remember whether I was or was not there the next morning when the landlady of the apartment house gave orders to move. Miss Anderson moved out of that apartment later on. I wasn't there when she moved. [67]

EMANUELL BERNARD ROSEGARTEN

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Neukom:

I know Joe Di Marzo. I first met him in November 1940. I believe that was at his home on Garland Avenue. I don't recall who was present.

Q. Did you ever meet Judy Bradford?

The Witness: If it please the Court, I believe I don't have any civil rights, granting you that I don't know anything about it, but I believe I still do own some constitutional rights and I refuse to testify on the ground that anything I might say is apt to further incriminate me.

The Court: On that particular question, Mr. Witness, I don't think it contains anything of a degrading or incriminating nature whatever your answer might be. And I think the general rule is that

(Testimony of Emanuell Bernard Rosegarten.)

it must appear that the particular question will tend to incriminate or degrade the witness rather than a general line of interrogation.

Mr. Lavine: The only observations I have for the benefit of the Court are that it may develop, your Honor, that as far as this man's connections or knowledge of Judy Bradford are concerned. I don't know. That is something he has to determine, and your Honor has to determine, supposing it involves [68] a Federal charge, or one that involves the very issue we are trying here as to this witness rather than the defendant on trial. Then it is a question for him and for your Honor to determine because the very knowledge of a person might be an incriminating answer.

The Court: That situation might arise. I am fully aware of that, and I want to assure the witness that whatever rights he has will be preserved to him and he will be protected in them, but he can lose no right by answering that question. Now, the situation might arise where a question in itself would tend to incriminate or the answer might tend to incriminate as it appears from the question.

The Witness: If it pleases the Court, I happen to be incarcerated in San Quentin penitentiary. I was sentenced there for pandering. Every person involved in this case is directly and indirectly connected with my being incarcerated in that penal institution at the present time. Consequently, anything that I would say at a future date might be used against me.

(Testimony of Emanuell Bernard Rosegarten.)

The knowledge alone of these persons or person might tend to incriminate me at a later date.

As I understand, Mr. Di Marzo's own convictions and statements given in a court of the state brought this trial up to the present time or else he wouldn't be in Federal court if he hadn't made and stipulated in various arguments prior to this time. [69]

The Court: I can appreciate your feeling that you do not want to do anything that will incriminate you or subject you to further prosecution.

I cannot see, however, how knowing a certain person would or would not tend to incriminate or de-grade you.

Everybody is entitled to the presumption of innocence, and every transaction is entitled to be presumed to be an innocent transaction until otherwise proven.

The Witness: I do not intend to insult the intelligence of the Court by making that remark, but if your Honor will weigh the problem out, why, you will see where on my own rights that I don't have no feeling to testify merely on those grounds. Those are the only grounds I can preserve myself on and consequently those are the only grounds that I can try to protect myself on.

I think that I deserve every protection in the world in this particular case or any other case that may develop from it.

The Court: You shall have every protection that the law gives you. Certainly that question does not

(Testimony of Emanuell Bernard Rosegarten.)
incriminate him and I am compelled to instruct the witness to answer that question.

The Witness: Then I have no alternative.

Q. By Mr. Neukom: Did you ever meet Judy Bradford?

A. Do you want me to answer that question?

The Court: Yes. [70]

The Witness: I want to make a statement before I answer.

The Court: Very well.

The Witness: If this is being taken, my remarks, I want it so stipulated in the transcript that I refuse to testify in this case. I have no desire to testify even to this question that you are asking me, and only upon your request I am compelled, as I see it, to answer his questions, is that correct?

The Court: That is correct, yes.

(The question was read as follows:

“Q. Did you ever meet Judy Bradford?”)

A. Yes, I did.

By the Witness:

I have seen the girl on a number of occasions. Just where I don't recall. I have seen Judy Bradford in the presence of Joe Di Marzo, if I recall correctly.

Q. Now, to clear up one possible thing, Mr. Rosegarten, as far as you know, you had no connection with the aiding or assisting of Judy Bradford to go to Honolulu in January of 1941, did you?

A. Definitely not.

(Testimony of Emanuell Bernard Rosegarten.)

Mr. Lavine: I object to that as calling for a conclusion from this witness, and it is irrelevant, incompetent and immaterial as far as this case is concerned.

The Court: Well, so far as he knows, that is the question. [71]

Ordinarily, I think a question like that would be improper but in view of the situation here and the fact that this witness is now incarcerated in San Quentin penitentiary and in the custody of the law and has indicated his desire to be protected in his rights and in view of the latitude allowed the Court in examining into matters such as these, I will permit that question and I will overrule the objection.

Mr. Lavine: Exception noted.

By the Witness:

I did not have a conversation with Joe Di Marzo in either November or December of 1941, where Joe Di Marzo in the conversation mentioned to me three girls and discussed a trip to Honolulu. I did not have such a conversation. I had no conversation with Joe Di Marzo with respect to his statement that he was going to send one of three girls to Honolulu. I don't remember if I was ever present in a conversation between the time I first met Joe Di Marzo, in the latter part of January, 1941, where he discussed with me the sending of Judy Bradford to Honolulu.

Mr. Neukom: Now, your Honor, I respectfully must urge that this witness is unwilling. He has been interrogated, and in good faith I can tell the

(Testimony of Emanuell Bernard Rosegarten.)

Court that he has made, statements, definitely——

Mr. Lavine: Just a minute. I object to any statements that the prosecutor says he made. He should do that outside of this courtroom. [72]

The Court: Yes, I think the jury must be instructed to disregard that.

Mr. Neukom: May I cross examine the witness?

By Mr. Neukom:

By the Witness:

I did not speak to Mr. Lavine last night at all. Mr. Lavine has spoken to me since I have been in the County Jail, but not in reference to the case.

I recall a venison dinner at my home in Los Angeles on Christmas Eve, 1940. I think Joe Di Marzo was present. At that particular evening Joe Di Marzo did not have a conversation with me with regard to securing money to send Judy Bradford to Honolulu, that I recall.

Q. By Mr. Neukom: Do you recall having had a conversation with me in the presence of Mr. Tyler Wednesday afternoon in the office of the United States Attorney on the sixth floor?

Mr. Lavine: Just a minute. I object to that as irrelevant, incompetent and immaterial, what conversation he had with the United States Attorney with reference to this case.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Witness: Well, if I answer that question, your Honor, there is only one way I can answer that without impeaching myself. It seems that the

(Testimony of Emanuell Bernard Rosegarten.)

District Attorney is [73] trying to make a liar out of me, so to speak, and by answering that question, that is exactly what he is trying to do. I am down here, not because I want to be here. I had no intention of coming down here. I am down here against my will. I did not want to come down here to testify. That was told to the Federal Bureau of Investigation on two occasions at San Quentin Penitentiary and at my place of business on Central Avenue in Los Angeles.

The Court: You have, however, taken the oath here to tell the truth.

The Witness: Yes, I have.

The Court: And with respect to that oath, I know it is your desire to tell the truth. The question is in proper form and it calls for an answer, either "Yes" or "No."

Now, after you answer, if you desire to explain, you may have that opportunity to do so.

The Witness: All right.

The Court: In other words, so far as it is possible for this Court to protect your rights, this Court will do so.

The Witness: I did have a conversation with Mr. Neukom in the Hall of Justice Building here—in the Federal Building here on the sixth floor. That conversation at that time was not in bearing to the case. It was idle conversation that went on from one person to another. Whatever I may have said at that time—I could have said a number of things. However, it was not taken under oath, and it

(Testimony of Emanuell Bernard Rosegarten.)
was [74] not taken down in a signed form of a statement. Therefore, I don't think that I——

Mr. Lavine: May I enter an objection here that he has answered the question that he had that conversation, and I think all the rest is now beyond the question.

The Court: Yes, I think that is correct. Proceed, counsel.

Q. By Mr. Neukom: Did you not, during that conversation, tell me, among other things, that on Christmas Eve of 1940 that Joe Di Marzo was at your home on Oakwood and that during the course of the evening he told you that he wanted to get ahold of \$500 each for three girls to send them to Honolulu?

Mr. Lavine: Now, just a minute. I object to that question as improper, as prejudicial misconduct, not within the issues of this case and not tending to prove any issues of this case and tending to inject other matters not in issue here that would involve other alleged offenses that are not at issue here that are highly prejudicial. I ask your Honor to instruct the jury to disregard it.

The Court: The objection is overruled.

Mr. Lavine: Exception.

The Witness: I may have said a number of things at that conversation. Included in that I may have said that. However, I don't know exactly what I did say. [75]

(Testimony of Emanuell Bernard Rosegarten.)

By the Witness:

I don't remember whether in the latter part of 1940, possibly New Year's Eve, I was present in Bakersfield in an auto court with my wife, Mrs. Rosegarten, and Joe Di Marzo. I was quite inebriated that night.

Q. Do you recall in my room last Wednesday that you told me that you, your wife, and Joe Di Marzo had driven from Los Angeles to Bakersfield on or about New Year's Eve of 1940 and during the course of that evening you met Judy Bradford, who was then up at Bakersfield?

Mr. Lavine: At this time I object. There is no proper foundation laid for this form of interrogation, and the question at this time is improper, irrelevant, incompetent and immaterial. This is an improper method of attempting to refresh the recollection or impeach the witness. There is no proper foundation laid for this form of interrogation. In other words, if he is attempting to refresh the recollection of the witness, it is improper, no proper foundation laid. If he is asking it as an impeaching question or as a hostile witness, there has been no foundation laid. And as far as the implications are concerned, I assign the asking of it as prejudicial misconduct.

The Court: The objections are overruled.

Mr. Lavine: Exception.

The Witness: Well, I believe I stated a minute ago, any conversation that I did have with Mr. Neukom a few days [76] back, I don't remember it or recall what I did say.

(Testimony of Emanuell Bernard Rosegarten.)

That was the question: Do you remember an incident that took place that I told him about in his office of that trip. I believe that is it, if I am not mistaken. Well, any conversation that I had with Mr. Neukom in his office, I don't recollect what I did and did not say.

The Court: His question is, Do you remember saying that particular thing.

The Witness: I don't remember.

Q. By Mr. Neukom: Do you remember that in my office Wednesday last, in the presence of Mr. Tyler, myself and your wife that you told me that during the trip to Bakersfield that Judy Bradford came over to the auto court where you people were staying and that Joe Di Marzo showed to you a stack of bills that you indicated was from two to three inches high and told you he had received those from Judy Bradford?

Mr. Lavine: Now, just a minute. I object to that mode of questioning, no proper foundation laid, irrelevant, incompetent and immaterial. I assign the asking of it as prejudicial misconduct.

Mr. Neukom: When I said, "bills", I mean currency, not obligations. I mean American currency.

The Court: You state on the basis that there is no foundation laid?

Mr. Lavine: Yes, your Honor. [77]

The Court: Objection overruled.

Mr. Lavine: That is one of the grounds, your Honor. Exception, your honor. If I haven't made myself clear, this is an improper method of ques-

(Testimony of Emanuell Bernard Rosegarten.)
tioning this witness. Attempting to refresh his recollection.

The Witness: I said a number of things. I don't really remember what I did say.

The Court: Well, his question is, Do you remember that?

The Witness: That specific incident?

The Court: Yes.

Mr. Neukom: Yes.

The Witness: No, I don't.

Q. By Mr. Neukom: Is it not true, Mr. Rosegarten, that I told you at that occasion in my room Wednesday that all I wanted you to do was tell the truth?

A. That is correct.

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, what conversations this witness had with Mr. Neukom in his office.

The Court: Objection is overruled.

The Court: It is always competent in any court I know to admit testimony that somebody has been told to tell the truth.

Mr. Lavine: Well, he has been told to tell it here, your Honor. But what he was told in Mr. Neukom's office is simply self-serving, as far as the United States Attorney [78] is concerned, and I assign that further ground.

Mr. Lavine: Exception to your Honor's ruling.

The Court: The objection is overruled.

The Witness: Yes, I believe you did.

Mr. Lavine: May I have a running objection,

(Testimony of Emanuell Bernard Rosegarten.)

your Honor, to all of the questions in this form and manner so that I don't have to keep repeating and perhaps wearing everybody out in order to protect my record here; that any of these questions asked in this form and in this impeaching manner are improperly asked and that they are without proper foundation and that they are irrelevant, incompetent, immaterial, as to matters that occurred somewhere else in Mr. Neukom's office? That they are irrelevant, incompetent, immaterial as to what conversations took place in Mr. Neukom's office.

The Court: All right. It may be understood that you will have those objections to this entire line of questioning without repeating the objection each time, and that the ruling of the court will be the same and that you may have exceptions to each one as if you had repeated in full your objection upon the occasion of each question.

By the Witness:

I first met Joe DiMarzo in November, 1940. I was in rather frequent contact with him after that for a period of two or three months. I knew him. I would see him on an average of two or three times a week. The last time I actually saw him was some time in January of 1941. Joe [79] Di Marzo did not tell me, on or about December 24, 1940, that he intended to send Judy Bradford to Honolulu. I don't remember whether I told you in your office Wednesday in the presence of my wife, Mr. Tyler and some other persons that were present there, that Joe Di Marzo had told me on or about December 24,

(Testimony of Emanuell Bernard Rosegarten.)

1940, that he was having trouble getting \$500 with which to send Judy Bradford to Honolulu. I may have. I recall on the interview in your office that you showed me a statement purporting to be taken of my wife.

Q. By Mr. Neukom: I permitted you to read it, did I not? A. Yes, you did.

Mr. Lavine: Now, to which I object, your Honor, as an attempt to get hearsay evidence before this jury, something that purported to be a statement taken from this man's wife, which is not in the presence of the defendant nor about which he knows anything at all.

The Court: It can only be admissible as preliminary. And on that basis it is admitted, and your objection is overruled.

Mr. Lavine: Exception.

The Court: Subject to a motion to strike, if it is not properly connected up.

Q. By Mr. Neukom: Do you recall that you told me in my office last Wednesday afternoon that you had driven up to [80] the apartment occupied by Judy Bradford at 618 South Detroit Avenue in the latter part of the month of January, 1941, and had seen a taxi going away?

A. Yes, I saw a taxicab that day.

By the Witness:

When Joe first introduced Judy Bradford to me, it was at Judy's apartment, I believe. My wife was not present. I first met Mr. Di Marzo in November 1940. He first introduced Judy Bradford to me in

(Testimony of Emanuell Bernard Rosegarten.)
the latter part of November at her apartment at 618, or thereabouts, South Detroit. There were some other people present at the time, from some place in the western part of the country. We had merely a social conversation on that occasion. They knew nothing of any connection or any personal business or anything else.

I had a temporary address on Oakwood Avenue in the months of November and December of 1940.

Q. My Mr. Neukom: And is it not true that Joe Di Marzo brought Judy Bradford to your temporary abode on Oakwood, and in the presence of another person, whose name we won't mention, unless requested so to do, Joe Di Marzo said that Judy Bradford was one of his girls and would accept calls to be sent out upon as they came in?

Mr. Lavine: To which I object as irrelevant, incompetent, and immaterial. We are not trying Judy Bradford or Joe Di Marzo on any State charge or any conversations had with this man as to some address on Oakwood. [81]

The Court: Was the time fixed in that question?

Mr. Neukom: I said "November or December," your Honor, of 1940.

The Court: Have you completed your objection?

Mr. Lavine: Yes, irrelevant, incompetent, immaterial, not within the issues of this case.

The Court: Overruled.

Mr. Lavine: Exception.

Mr. Neukom: And I want to supplement that by in either the month of December or November, 1940.

(Testimony of Emanuell Bernard Rosegarten.)

Mr. Lavine: Objected to as too complicated, compound, about five questions in one.

The Court: Overruled.

Mr. Lavine: Exception.

Q. By Mr. Neukom: Did the defendant, in your presence, at an address on Oakwood, tell you in the presence of another party that Judy Bradford would accept calls and go out on them that she was one of his girls?

The Court: In the months that you have named?

Mr. Neukom: The months of November and December of 1940, one or the other.

Mr. Lavine: I renew my former objections as not within the issues of this case.

The Court: The objection is overruled.

Mr. Lavine: Exception.

The Witness: As far as I can remember, he did not. [82]

(Three photographs are presented by Mr. Neukom.)

(The documents referred to were marked for identification as 'Governments Exhibits Nos. 3, 4, and 5.')

By the Witness:

Government's Exhibit No. 3, for identification, is a picture of Miss Bradford, I believe. I only knew one Judy Bradford.

(At this point Judy Bradford enters the court room.)

Q. By Mr. Neukom: The person who is here at my right, do you know who she is?

(Testimony of Emanuell Bernard Rosegarten.)

A. It has been some time since I have seen the young lady. She looks entirely different. But from the photograph I would say it is the same person.

Q. Was that the person you met, the Judy Bradford that you met?

A. I couldn't say definitely, to be frank with you.

Q. Did you ever meet any other person introduced to you by Joe Di Marzo who was identified as Judy Bradford?

A. I have been out of circulation for some ten months, Mr. Neukom, and faces of women just don't come back the way they used to.

(Judy Bradford leaves the courtroom.)

Cross Examination

By Mr. Lavine:

I have absolutely no use for Mr. Di Marzo, to be very frank with you. My present attitude is out of the *desire* [83] *protect* myself alone. I feel that both my wife and I are at present incarcerated in prison as a direct result of activity on the part of Mr. Di Marzo. After I was brought down here I was taken to Mr. Neukom's office. I visited there with my wife. My wife was brought down from the State Prison at Tehachapi. I was permitted through the agency of the government to have a friendly visit with my wife. Mr. Neukom and the Government have been just as nice as anyone has ever been to me. I was shown a statement that was purportedly taken from my wife by the Government agent. I read it, but the contents were of no interest to me.

Q. Did you make any statement that the matters

(Testimony of Emanuell Bernard Rosegarten.)

contained therein were untrue or incorrect, or anything of that sort?

A. There were several——

Mr. Neukom: I object to that, your Honor, because obviously this witness cannot be the final judge of this case. That would be invading the province of the Court and jury, your Honor. The question is ambiguous. There is nothing before the witness. "Were the statements untrue" is obviously such a broad question that it can't be intelligently answered.

The Court: The objection is sustained.

By the Witness:

The statement was not shown to my wife at that same time [84] or some time while I was present—that I remember. I was not shown any other statements at that time.

Redirect Examination

By Mr. Neukom:

I did tell you that I would prefer if you would not call my wife as a witness.

Mr. Lavine: May I have an exception to that ruling sustaining the objection to my asking the contents of the statement?

The Court: Very well. [85]

JOAN DAY,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

(Testimony of Joan Day.)

Direct Examination

By Mr. Neukom:

I know Joe Di Marzo. I first met him about the first part of December, 1940. I know Judy Bradford, also known as Helen Merle Beverlin. Government's Exhibit No. 3, for identification is the Judy Bradford I know. I first met Judy Bradford about the same time I met Joe Di Marzo. I believe it was at Joe's house, at 712 South Garland, Los Angeles. I just met her and said, "Hello" to her. I was present in the apartment of Marion Anderson sometime in the month of January 1941, when Marion Anderson was in bed with a broken leg. On that occasion there was present Marion Anderson and Joe, and Judy came in later, and Marion's nurse. It was some time in 1941, I believe. At that time, when she was in bed with a broken leg, Joe introduced me to Marion Anderson.

Q. What did he say, as far as you can remember at this time?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case. This girl isn't in issue as far as this case is concerned, your Honor.

The Court: This was on the occasion which has just [86] been identified. Is that the question?

Mr. Neukom: Yes, your Honor.

The Court: When Judy Bradford was present?

Mr. Neukom: Judy Bradford was not present at the initial part of the conversation.

The Court: The objection is overruled. You may answer the question.

(Testimony of Joan Day.)

Mr. Lavine: Exception.

By the Witness:

He said he wanted me to meet her, or after he introduced us he said, "Here's a nice little girl, a new girl," or something, and she has never done this before.

Mr. Lavine: Now, if your Honor pleases, I move to strike the answer as highly prejudicial, not within the issues of this case. The reference and the implication from it certainly relate to some other transaction. It has nothing to do with the issues before this Court.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Court: Motion to strike denied.

Q. By Mr. Neukom: Were you a prostitute at that time? A. Yes.

Q. Did you remain a prostitute for a period of time after that? A. Yes.

Mr. Lavine: Now, just a minute, if your Honor pleases [87] I object to the last two questions and move that the answers be stricken so I can have a ruling. It is highly prejudicial misconduct, not relating to the charge for which this defendant is on trial, relating to Helen Merle Beverlin. Whether this girl wasn't a prostitute is not the same transaction. The same transaction is not the one involved in this indictment. It is certainly tending to prejudice this defendant as to other matters irrelevant to the issues in this trial.

The Court: The motion is denied and the objec-

(Testimony of Joan Day.)

tion is overruled without prejudice to renewal of the motion to strike.

Mr. Lavine: Exception.

By the Witness.

In January, 1941, Joe had some conversation with me concerning Judy's going to Honolulu. He said that she and another girl were leaving and that it was very expensive. He had to pay for the tickets for the passage and it was all arranged.

Q. Did he give you any reason why they were going to Honolulu

Mr. Lavine: I object to the question as calling for a conclusion of the witness.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: He said that she had been over before and could make much more money over there than here. [88]

Q. By Mr. Neukom: Did he tell you what work she was following at that time?

A. He didn't come right out and tell me what it was.

Q. By Mr. Neukom: Did you ever go to work for Joe Di Marzo? A. Yes.

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case. He is not being tried for a State or other offense that can be brought in here. I assign the asking of it as prejudicial misconduct.

The Court: Overruled.

(Testimony of Joan Day.)

Mr. Lavine: Exception.

Q. In what line of work? A. Prostitution.

Q. About when did you start?

Mr. Lavine: Just a minute. I didn't have time to interpose my objection to that last question and to all further questions along this line, your Honor, on the same ground.

The Court: Very well. It may be deemed to be made to each question without repeating specifically the objection or the grounds. The objection to that question is overruled.

Mr. Lavine: Exception noted.

By the Witness:

I started about the first of January, '41. I continued to work as a prostitute about three months. I shared the [89] proceeds from my practice with Joe Di Marzo, all of it.

Mr. Lavine: Is your Honor bearing in mind my objection to all of this?

The Court: Well, yes.

The Court: The objection is overruled. This ruling is without prejudice to a motion to strike.

By the Witness:

I am twenty years of age. I have been to Judy Bradford's apartment at 618 South Detroit Avenue. I don't think I was there before January 25, 1941. I did occupy apartment No. 5 at 618 South Detroit Avenue after Judy Bradford left it for about a month and a half. Joe Di Marzo visited me at the apartment. I did not practice prostitution at that apartment. Joe Di Marzo told me that Judy Brad-

(Testimony of Joan Day.)

ford had gone to Honolulu. I wrote some letters dictated to me by Joe Di Marzo to Judy Bradford in Honolulu. I did not retain copies of the letters that I wrote. I wrote them in my handwriting. I addressed them to Honolulu. I don't recall the address where I addressed them. Joe Di Marzo talked to me about receiving letters from Judy Bradford after she left in January, 1941. Joe Di Marzo asked me to write a letter from him to Judy Bradford in Honolulu. He asked me if I would write the letter. He would tell me what he wanted written, and he said if he wrote that they would probably, or, might check up on his handwriting and he didn't want his handwriting in it. I don't remember if [90] I signed the letter "Joan" or what I signed it. I discussed, in the letters, about the weather, it was just impersonal things. Joe never told me as to whether or not reference to the word "weather" had any meaning, but some of the things that she wrote meant something else. He said that to me. He said something like "the weather is cold down here" or "I can't get out very much"; "I am sick" or something, meaning that business wasn't very good. I am reciting now what Mr. Di Marzo told me. About the weather, and just little impersonal things that had different meanings. "The weather is cold" or something like that meant that she wasn't feeling well or that she wasn't working and wasn't getting very much, or something. I don't know. I think I wrote two letters. Joe told me to write the second letter. I wrote in his dictation. I saw Judy Brad-

(Testimony of Joan Day.)

ford sometime around about Easter, that is, in the month of April 1940, in Los Angeles. That was at Joe's house, at 712 South Garland, it was in 1941. It is the same year following the broken leg of Marion Anderson. At that time, there was present Joe and Judy and myself and, I think, two other girls were there. At that time I was shown Traveler's Checks or there were Traveler's Checks displayed in my presence; but not while anybody else was there, just Joe and I were there. Joe, he said he was mad and wanted to beat up on her because all she brought back was \$500 and she hadn't been working. She didn't work over there and she [91] played around with the Kanakas, or something.

I saw the Traveler's checks. They were in hundred dollar denominations. I saw that there were five of them. They were in the hands of Joe Di Marzo.

I am not presently a prostitute.

Cross Examination

By Mr. Lavine:

I went to work for Mr. Di Marzo in January 1941. I knew him around in December 1940. I had been in Los Angeles prior to that time. I had been living here for about a month. I moved into this apartment at 618 South Detroit Street about the middle of January. When I moved in there was not anyone else living in there. I didn't see Judy Bradford when I moved in there. She had already gone. I brought my personal things there to the apartment. There were a number of things of Judy Bradford's

(Testimony of Joan Day.)

there. I don't know if all her clothes were there. I didn't see them. The closet was locked. I talked to the landlady of that apartment house. She told me that she had locked Judy's clothes up. Joe told her to. Joe told her to lock the door of the closet, and she didn't tell me she locked it. She was right there with Joe and I when it was locked. The closets were not locked when I moved in. I did not see Judy's clothes there. They were in one closet, Mine were in another, and I didn't even open up the door to look. I didn't open up the door to look in the closet that Judy's [92] clothes were in. They were too small for me.

I think two letters is all I wrote to Judy Bradford. I don't remember the first letter I wrote. I think I addressed the envelope to "Mrs. Judy Bradford." I addressed the envelope somewhere in Honolulu, I don't know the address. It was a short letter. The first letter was about a week, two weeks, after I moved into this apartment. I wrote the second letter about two weeks after that. In the second letter I said the same thing as I said in the first, practically. I don't really remember. I remember everything. But I don't remember what was in a letter. I wasn't that much interested in it. I wrote the letter in the apartment.

I first met Mr. Di Marzo at his apartment. He was laid up with a bad leg. He was living at 712 South Garland. That is the apartment court. He had his own apartment there. He wasn't over at 618 South Detroit at the time I met him because

(Testimony of Joan Day.)

I just met him over there just casually. He told me that I could live at this place. He didn't say "for a short time." He said that was my apartment, and everything in there, except her clothes, was mine if I wanted them. I didn't have a cent personally. Prior to moving over to 618 South Detroit I was living on 724 Oakwood. I never had any conversation with Judy Bradford about her going to the Island. Judy Bradford never told me that she was going to the Island. Mr. Di Marzo told [93] me that she was going to the Island. There was present myself the first time, and he just talked about it to everybody—Manny and Gail and—— This was either in a car or over at the place where I was working or over to his house.

I was not arrested in Delano for prostitution. I was never arrested. As to whether I was taken into custody by the authorities at Delano—but I wasn't arrested.

When I was in the Superior Court in Department 45 of the Superior Court in the case of *People vs. Di Marzo*, I remember seeing Joseph Di Marzo in the courtroom or just outside the courtroom. Mrs. Fairchild being a detective from the Los Angeles County District Attorney's office was present. There was also present two of the other girls that were in the same case. I don't know what date it was. I remember being in the court in the latter part of 1941, in Department 45 of the Superior Court in the Hall of Justice across the street there in the custody of Mrs. Fairchild; Mrs. Fairchild being

(Testimony of Joan Day.)

present and it being just outside of the courtroom of Judge Clarence Kincaid and that Mr. Di Marzo was also present—I do remember that occasion.

As to whether I remember having an argument with Mr. Di Marzo because of my detention—I have never had an argument with him on things like that, I mean, since he has been taken in and since I have been testifying. He has [94] always said, “How are you,” and “Hello,” and that is all I have said to him. That is all I said outside of that courtroom at that time, because they wouldn’t let us talk to—what do you call them?—witnesses, or something.

I was in custody about eight months.

As to whether at that time and place in talking to Mr. Di Marzo I did not say, ““If it hadn’t been for you, this would never have happened to me””?—No, I never said that to him.

I go by several other names.

Redirect Examination

By Mr. Neukom:

I was being held then as a material witness. The “Manny” I referred to, was Manny Rosegarten.

Recross Examination

By Mr. Lavine:

As to whether I had a conversation with Mr. Di Marzo and Mrs. Fairechild about Mr. Di Marzo’s helping out the Los Angeles County District Attorney’s office in their investigation in which I was being held—— All I could say was, “Hello, how

(Testimony of Joan Day.)

are you.” They wouldn’t let us talk intimately with him unless she was there. And he would never say anything except, “How are you getting along” and “What are you doing.” I did not tell Mrs. Fairchild if it hadn’t been for Di Marzo that I wouldn’t be held as I was.

I remember about a month prior to this date that I was [95] in the Superior Court that I was taken to the house of Grant Cooper, the Chief Deputy District Attorney of Los Angeles County. I remember Mr. Di Marzo being there at that time. I was then in custody, brought there in custody. I do not remember on that occasion stating to Mr. Di Marzo in the presence of the persons present there, Mrs. Fairchild and Mr. Grant Cooper, and possibly one or two investigators from the District Attorney’s office, that Mr. Di Marzo had brought about this situation that I found myself in. I did not make a statement to Mr. Cooper at that time, because Mr. Cooper was hardly even in the house. It was all the other ones talking to us. All I did was to talk to Joe, and he lit my cigarette once.

As to whether I made any kind of statement to the Deputy District Attorney—I don’t think so. I am not sure. I don’t think I made any statement. We talked, I mean, we talked about different matters and everything; but I don’t think I made a statement. The only statement I made was up in the District Attorney’s office. I made a statement in the District Attorney’s office. I made a state-

(Testimony of Joan Day.)

ment to the District Attorney when I first got in there.

Redirect Examination

By Mr. Neukom:

When I was in custody for about eight months, we had a beautiful apartment. I was kept in an apartment by the District attorney of Los Angeles County, not the Federal District Attorney. [96]

DAVID GOODSSELL

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Neukom:

I was employed by the Matson Navigation Company, commencing May 10th, 1939. At that time I was on the Monterey. I was working as a bartender on the S. S. Lurline on the voyage sailing from Wilmington on January 24th or 25th, 1941. During the course of that voyage I met Judy Bradford or Helen Merle Beverlin.

Government's Exhibit No. 3 for identification is a picture of the Judy Bradford I met on that voyage. I took this picture.

(The document referred to was received in evidence and marked Government's Exhibit No. 3.)

(Testimony of David Goodsell.)

This other picture, Government's Exhibit No. 4 for identification, with the bridge going across to Oakland on the back of it is a picture of myself and Judy Bradford. That was taken on the promenade deck of the Lurline, about the 14th of April, 1941, on the return voyage of the Lurline from Honolulu.

As to Government's Exhibit No. 5 for identification—I took that picture. The woman to the left who has the hat on is Judy Bradford. I don't know the name of the other [97] girl who was there. That picture was taken at the same time and place—On April 14th, 1941, or thereabouts, on the return voyage of the Lurline. I was a bartender then.

(The documents referred to were received in evidence and marked Government's Exhibits Nos. 4 and 5).

Upon the trip to Honolulu I met and talked to Judy Bardford. I sold her drinks, and talked to her and became acquainted with her. I was aware of the fact that she did land in Honolulu at the conclusion of that voyage commencing on or about January 25, 1941. I saw her several times on the Islands.

While I was on the Islands I went to a place known as the Palace Hotel. There I met Judy Bradford.

Q. Did you have sexual relations with Judy Bradford?
A. Yes.

Mr. Lavine: Just a minute, if your Honor please. I object to that as irrelevant, incompetent, im-

(Testimony of David Goodsell.)

material. A single act of immorality or sexual relations would be immaterial. Besides it isn't what happened subsequent. It is the intent with which the debauchery was alleged to have occurred.

The Court: Objection overruled.

Mr. Lavine: Exception.

By the Witness:

I had sexual relations with her. There were other girls in attendance at that Palace Hotel. [98]

Q. Other prostitutes? A. Yes.

Mr. Lavine: Now, just a minute. That is assuming a fact not proved here, that she was engaged in prostitution at that time or that there were other girls who were prostitutes. It calls for a conclusion of this witness.

The Court: The question is, Whether other girls were in attendance at the hotel. The witness said, "yes," and then he said, "were they prostitutes?"

Mr. Lavine: That calls for a conclusion of this witness.

The Court: The objection is overruled.

Mr. Lavine: Exception.

By the Witness:

They were prostitutes. I paid Judy Bradford a fee of three dollars in return for the intercourse had upon the occasion that I went to the Palace Hotel. That act was between the time I first met her and the time that she returned on the Lurline some time in April of 1941. In April 1941, I saw Judy Bradford when she docked at San Francisco.

(Testimony of David Goodsell.)

She got on the boat in Honolulu some time in April of 1941, and she accompanied the boat all the way over to San Francisco, and docked in April of 1941. I saw Judy Bradford that same night at the St. Francis Hotel. She received a telegram that evening. I did not see the telegram.

Cross Examination

By Mr. Lavine: [99]

I met Judy Bradford on the boat going over. It was around the 24th of January, 1941. I served her drinks. She wasn't drinking constantly on the trip to my knowledge. I only saw her once on the trip going over the first night out. That was the only night that I served her with drinks. After I got over to the Island, I was on Island Oahu. I didn't go to the Palace Hotel to meet her. I had shore leave for a while from the boat. I was on the Island for two days. I did not take Judy out. I did not make an appointment to meet her at any time that I was to come back there on that trip. It was sometime later, several trips later. I didn't look her up. I can't remember the exact date I saw her on the Island after that. I think it was in March. I did not take her out then. I did take her out socially while I was on the Island. I took her to several bars. She had several drinks while she was there at these different bars. I took her to dinner on one occasion. I did not talk over with her the matter of coming back on my boat. I did not tell her when I was going to sail. On the same

(Testimony of David Goodsell.)

trip in April of 1941, I met her on the ship coming back. At that time I did not make love to her. I did not discuss the possibility of marriage with her. It is not a fact that when I got back here I telephoned to my mother and asked her for money to marry someone. I phoned my mother, but I don't remember asking her for \$1,000. I don't remember telling my mother that I intended to marry Judy Bradford. [101] I did propose marriage to Judy Bradford. I did not propose marriage to her on that trip back. I proposed marriage to her in San Francisco after I returned. Judy Bradford got off in San Francisco. I stayed on the ship, and the ship continued to come on to Los Angeles. I didn't get married to Judy Bradford after I had made this proposal to her. I didn't tell my mother I was going to marry Judy Bradford. I told her I was going to get married. Her name wasn't mentioned, to the best of my memory. Judy was right there at the time I phoned. Then I came on to Los Angeles on the Lurline. I saw Judy in Wilmington the day we got in there. She did not come on the boat. She came down on the train from San Francisco. At no time did I ever see Mr. Joseph Di Marzo. He was not on the boat at any time. I didn't ever see him in Honolulu. When my boat docked at Wilmington I didn't see him there. Government's Exhibit No. 4 was taken before the boat docked. It was out in the bay. That is a picture of Judy and I. I believe this was taken the same day as my proposal of marriage to her. This picture was taken the same time the other

(Testimony of David Goodsell.)

picture was taken. They were all taken the same day. Judy had some drinks after we arrived at San Francisco. She had probably three with me. I did not notice how much luggage Miss Bradford had when she came back on that trip. I did not visit her state room in the ship. I did not come to the Biltmore Hotel after I left the ship. I did not come into [102] Los Angeles. My ship pulled out that afternoon. Miss Bradford was not there at Wilmington when the ship came in. She came aboard the ship while the ship was in Wilmington.

Redirect Examination

By Mr. Neukom:

I did not know that Miss Judy Bradford was at the Palace Hotel upon the occasion that I testified to when I went up there. I didn't know it until I got up there.

Recross Examination

By Mr. Lavine:

I was on the boat until November 24th, 1941. Then I was off for three months, and I returned and I got off again June 8th, 1942. As to whether Miss Bradford accompanied me again sometime in the latter part of the spring of 1941 back to the Hawaiian Islands—I don't think she did. If she did I didn't see her on the ship.

HELEN MERLE BEVERLIN

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Neukom:

My name is Helen Merle Beverlin. I am also known as Judy Bradford. I am acquainted with Joe Di Marzo. I am twenty-four years old. I was born in Pleasonton, Kansas. I have known Joe Di Marzo around four years. [103]

I recall having gone to Honolulu on the Lurline, and having returned from Honolulu also on the Lurline sometime in April, 1941.

Before that trip I had been following prostitution. I worked for several different people. As to whether I ever worked for Joe Di Marzo—I don't know if you consider it working for a person.

Q. Had you shared the proceeds that you received from practicing prostitution with Joe Di Marzo in a period before January 25th, 1941?

Mr. Lavine: I object to that as calling for another offense not charged in this indictment.

The Court: Objection overruled.

Mr. Lavine: Exception. Too extensive and not within the issues of the case.

The Witness: Yes.

Q. By Mr. Neukom: And for how many months or years before January 25th, 1941, had you shared the proceeds you received from prostitution with Joe Di Marzo?

Mr. Lavine: Same objection.

(Testimony of Helen Merle Beverlin.)

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: Well, I can't remember exactly, but it's about, maybe three or four years. I am not sure.

By the Witness:

I am not married and never was married to Joe Di Marzo. [104] During the last four or five years I had not practiced any occupation other than prostitution.

I first met Joe Di Marzo in my apartment in Los Angeles about four years ago. I know Marion Anderson. I am aware of the time she had a broken leg and was in bed. That was before I sailed to Honolulu in January of 1941. I was not residing in the same apartment building that Marion Anderson was residing in in January 1941. During that time I was living on Detroit Street. I don't recall the exact apartment number. It was a back apartment. That was 618 South Detroit. I was not practicing prostitution at that time at that place. I think that it was on Normandie where I did practice prostitution. I am not just sure of the month. It was before I sailed for Honolulu.

Q. And during that period before you sailed for Honolulu did you share the proceeds that you received from practicing prostitution with Joe Di Marzo? A. Yes.

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of the case.

The Court: Overruled.

(Testimony of Helen Merle Beverlin.)

Mr. Lavine: Exception.

By the Witness:

I couldn't say how much money I was making a day during the period of January, 1941.

Mr. Lavine: May I have a running objection to all this [105] testimony, your Honor?

The Court: Yes, it may be understood that you have an objection to any and all questions relating to the acts and conduct of this witness prior to January 24th, or whatever date that is, 1941.

Mr. Lavine: Exception noted.

By the Witness:

I didn't keep track of it. I gave a part of my earnings to the proprietress, Marion Anderson. I don't know what proportion—just for room and board. I gave just a portion of my earnings to Joe Di Marzo. I don't know how much. I didn't keep track of that either. I was practicing prostitution at Bakersfield in December, 1940.

I had occasion just a little before New Years to be present when Joe Di Marzo, Irene Adams, also known as Mrs. Manny Rosegarten, and Manny Rosegarten came to Bakersfield. I saw those parties. During that occasion I gave Joe Di Marzo a stack of bills. I really don't know how much was there. It was around \$100.00. That money was obtained from prostitution. I can't recall giving Joe Di Marzo some money on one occasion in Marion Anderson's apartment while she was suffering from a broken leg. I can't recollect doing it. I do not

(Testimony of Helen Merle Beverlin.)

recall ever giving Joe Di Marzo some money in the presence of Marion Anderson at any other time.

I have worked as a call girl. That is when a call comes in on the telephone for a girl to go some place. In meeting [106] the calls as a rule sexual intercourse was had for a consideration. The monies I received from that type of work, I shared with Joe Di Marzo.

Q. For how many years or months before January of 1941 do you recall that you worked as a call girl?

Mr. Lavine: I suppose my objection is still running?

The Court: Your objection is still good; same ruling and same exception.

The Court: When I say "Your objection is good" I mean to say that it is deemed to have been made.

By the Witness:

I don't know just exactly. I didn't work as a call girl very long. I worked both as a call girl and also in an apartment, at different addresses. Before I went to Honolulu in January 1941 I had some conversation with Joe Di Marzo about his giving me money to make that trip. I couldn't recall exactly just how long before it was. It might have been two weeks. I am not sure of the exact date. That I wanted to go to Honolulu was practically the conversation. I needed some money to go on. At that time he did not owe we any money. He did give me some money. Enough for my ticket and some over. I don't remember what the ticket

(Testimony of Helen Merle Beverlin.)

was. It must have been around \$200.00. I first bought a first class ticket. I think I had the ticket changed. I got a refund when I was on the boat. On this photostat from Government's Exhibit No. 1 for identification where [107] the "X" is, "J. Bradford," is my signature. I received a ticket under the name of "Mrs. Judith Bradford." That appears to be a photostatic copy of the ticket I received.

(The document heretofore marked as Government's Exhibit No. 1 for identification was received in evidence.)

I sailed on the Lurline. I met one David Goodsell, a bartender on the boat. While at Honolulu I went to live or stay or work at the Palace Hotel. While I was staying at the Palace Hotel I was practicing prostitution. I had occasion upon at least one time to have professional sexual intercourse with David Goodsell, for which I was paid a fee.

Q. By Mr. Neukom: Did you practice prostitution at the Palace Hotel for at least or approximately one month? A. Yes.

Mr. Lavine: Now, just a moment, if your Honor please. When happened on the Island subsequent to the transportation alleged in the indictment is irrelevant, in competent, immaterial. I object to it on that ground.

The Court: Objection overruled.

Mr. Lavine: Exception.

Q. By Mr. Neukom: Did you continue to practice prostitution for the whole period of time that

(Testimony of Helen Merle Beverlin.)

you were over there on the trip that commenced January 25th, 1941?

Mr. Lavine: Same objection, your Honor. May I have a running objection on that ground and also that there is no [108] connection shown as to the charge here on trial?

The Court: You may have your running objection. The objection is overruled and exception will be deemed to be noted.

The Witness: Yes, practically all the time.
By the Witness:

I worked at the Palace Hotel all that time. I do not know approximately how much money I would take in gross a day. I returned from Honolulu sometime in April 1941, and sailed back on the Lurline. David Goodsell was on that boat. I docked in San Francisco. I recall that David Goodsell took some pictures of another girl and I when I returned from Honolulu on the boat. Particularly in the harbor right off San Francisco.

When I arrived in San Francisco in April 1941 I went to the St. Francis Hotel. Mr. Goodsell and I were together for some of that evening. While I was there I think I sent a wire to Joe Di Marzo in Los Angeles. I probably told him that I had arrived. I received a reply. I received a wire from Los Angeles.

Q. Whose name appeared on the wire?

Mr. Lavine: Just a minute. Objected to as not the best evidence.

(Testimony of Helen Merle Beverlin.)

The Court: Objection overruled.

Mr. Lavine: Exception. [109]

By the Witness:

The name on the wire was "Joe." And "Joe" was the name that I gave to Joe Di Marzo or that I called him. The next day I went to Los Angeles by train. I arrived in Los Angeles around night time. I called up Joe Di Marzo when I arrived in Los Angeles. I talked to him. I guess it was him I talked to.

Q. And the number you called at that time, was that his number where he was living?

Mr. Lavine: Objected to as calling for a conclusion of the witness. She had been away three months.

The Court: Objection overruled.

Mr. Lavine: Exception.

By the Witness:

I called his home when I called him up, and talked with him on the telephone. I said I had just gotten off of the train, and he said, "Come over to the apartment." I took a cab to the apartment of Joe Di Marzo. It was on Garland. I think 712 South Garland was the correct address. There was a person present there by the name of George Reed. Joe Di Marzo was there. I think we conversed about something. I don't recall the conversation. I talked to him practically the evening, after I had arrived. Before I left Honolulu on this trip I had gone to the bank and purchased

(Testimony of Helen Merle Beverlin.)

around \$500.00 worth of traveler's checks. The money that I used to purchase those traveler's checks I had gotten [110] working at the Palace Hotel as a prostitute. When I arrived in Los Angeles on the train and went to Joe Di Marzo's apartment I had \$500.00 left in traveler's checks. I am not sure of what denominations they were. After my arrival on the evening in question when I went out to his place on Garland I did offer to Joe the traveler's checks. I don't really recall just how soon it was. I don't know whether it was that same evening or the next day. I did give those traveler's checks to Joe Di Marzo. I don't recall just when it was. It was possibly within a week or two after I returned. I did accompany or have Joe Di Marzo accompany me when I went to a bank on either West Sixth Street of West Seventh Street. At that time I had with me the \$500 worth of traveler's checks I had purchased in Honolulu. I signed them and had them cashed. I received in return Five Hundred Dollars. I gave it to Mr. Di Marzo. At that time I did not owe Joe Di Marzo anything.

Q. Now, with respect to a trip that you took to Honolulu—had you gone to Honolulu in August of 1940, that is to say, prior to this trip in January of 1941?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case,

The Court: Objection overruled, without prejudice to a motion to strike.

(Testimony of Helen Merle Beverlin.)

Mr. Lavine: Exception. [111]

By the Witness:

I had made another trip. I am not sure just what the date was.

Q. And had you returned on that first trip sometime in October of 1940?

Mr. Lavine: May I have a running objection to this former trip which is now referred to, your Honor?

The Court: On the grounds previously stated with relation to the other questions and previous activities.

Mr. Lavine: That is correct.

The Court: You may have your objection. The ruling will be the same, and exception noted.

By the Witness:

I returned in October or thereabouts, 1940. I had been back in the States about three months, or thereabouts, before I made this second trip in January, 1941. When I was over there on the first trip, (the one in 1940), that was my first trip to Honolulu—while I was over there in 1940 I had practiced prostitution. Before I went on the first trip in 1940 I had been practicing prostitution and sharing the proceeds that I received from customers with Joe Di Marzo—that is, here in the States. [112]

JOAN DAY,

called as a witness by and on behalf of the Government, having been previously duly sworn, was examined and testified further as follows: (This witness was recalled at the request of the defense.)

Cross Examination (Resumed)

By Mr. Lavine:

(Mr. Lavine requests the witness to address and write out in her handwriting just the way that she addressed the letter that she said she addressed to write out in her handwriting just the way that she remembers, and the way she signed it, on a piece of paper that he placed before her.)

By the Witness: I don't remember how I addressed the envelope. I think it was "Mrs. Judy Bradford."

(The witness writes.)

By the Witness:

I don't remember where I addressed the letter in Honolulu. I don't remember what name I possibly signed it. It could have been "Joan." It wasn't "Joe", I know. It could have been some fictitious name. I don't really remember. At that time I was going by the name of Renee Taylor.

(Mr. Lavine requests the witness to write "Renee Taylor.")

(The witness writes.)

(Mr. Lavine requests the witness to write anything that she remembers that was in the first letter that she sent her.)

(The witness writes.)

(Testimony of Joan Day.)

Mr. Lavine: (Reading)

“Dear Judy: How are you? How is your friend? Tell her to drop me a line if she has time.” [113]

By the Witness:

I believe that was in my first letter. Practically the same thing was in the second letter. The second letter was about two weeks after the first letter. I hadn't received a reply to any letter at that time, or at any time. I did get mail at 618 South Detroit Street addressed to me, but not from Honolulu. I did see mail at 618 South Detroit Street from Honolulu about the middle of January. It was received in the afternoon. It was addressed to “Mrs. Judy Bradford, 618 South Detroit” to herself. She addressed it, and Joe went and opened the box. I said, “Here's a letter to Judy.” He says, “No, it is for me.” I read it. I saw the letter, and it said, “Mrs. Judy Bradford, 618 South Detroit, Los Angeles, California.” I saw it in the afternoon. I did not say anything to anyone about this letter. If I remember correctly, I think I read the first one. He let me read it or read parts of it. I don't remember now whether I read it or whether he read it. I don't really remember.

Mr. Lavine: I offer this specimen of handwriting as Defendant's first in order.

(The document referred to was marked “Defendant's Exhibit A”, and was received in evidence.)

By the Witness:

I am sure now that this letter was addressed to

(Testimony of Joan Day.)

Judy Bradford at 618 South Detroit Street. [114]

I first took the name of "Joan" after I left Joe. I didn't take the name of "Joan" until some time in 1941. I took it before April, 1941. It was just before Easter..

Redirect Examination

By Mr. Neukom:

The letter that was received from Judy Bradford in Honolulu was received after she sailed in January. I went into her apartment in the first part of January, 1941. I don't know the date that she did sail. When I state that the letter was received in the middle of January, 1941, from Honolulu, I am not positive as to that date. It possibly could have been in the month of February. It was around then, I don't remember.

Q. Well, now, you state that you don't remember precisely what you wrote in the letter, as I understand your testimony; but you have some recollection that you wrote a letter for Joe Di Marzo wherein you state "How is your friend? Tell her to drop me a line if she has time." Joe told you who that friend was? A. Yes.

Q. What had he told you?

Mr. Lavine: Just a minute, now. I object to that as irrelevant, incompetent, immaterial, not proper redirect examination.

The Court: Objection overruled.

Mr. Lavine: Exception. [115]

The Court: Noted.

(Testimony of Joan Day.)

By the Witness:

He had told me that that was Viola. I had seen Viola once at Gail's and Manny's apartment. Joe had told me something concerning Viola's going to Honolulu. I do not recall the date when Joe told me anything about Viola. It was about two weeks before I had moved into the Detroit apartment. It was at 624 or 644 Oakwood. That was Gail's and Manny's home. There was present Gail and Manny Rosegarten, and Joe and Viola and another girl and myself.

HELEN MERLE BEVERLIN,

called as a witness by and on behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination (Resumed)

By Mr. Neukom:

I am also known as "Mrs. Judith Bradford", or "Judy Bradford". Upon my trip to Honolulu in January of 1941, someone did accompany me in my same cabin or stateroom on that trip.

Q. What was the name of that person?

Mr. Lavine: Just a minute. I object to that as irrelevant, incompetent, immaterial, not within the issues of this case, not within the indictment as alleged.

The Court: Does this go to the matter of intent of the defendant? [116]

Mr. Neukom: That is right.

(Testimony of Helen Merle Beverlin.)

The Court: The objection is overruled.

Mr. Lavine: Exception noted.

(The following remarks were made at the bench, outside the hearing of the jury:)

Mr. Lavine: The defendant objects to the introduction of evidence relating to, purporting to relate to other girls and other transactions not alleged in the indictment as violative of the Fifth Amendment to the Constitution of the United States requiring and providing for due process of law to be accorded to each defendant charged with a criminal offense and depriving him of that notice and opportunity to meet a charge that is properly alleged in the indictment and producing evidence also that is not properly a part of the particular charge, and, therefore, irrelevant, incompetent, immaterial to the issues on trial and prejudicial to the defendant.

The Court: The objection is overruled.

Mr. Lavine: Exception noted.

(The following proceedings were had in the hearing of the jury:)

The Witness: The name was Dianne Stevens. I think her other name was Viola.

Q. By Mr. Neukom: Did you ever know whether or not Viola had worked for Joe Di Marzo as a prostitute? [117]

Mr. Lavine: Object to that as calling for a conclusion of the witness; irrelevant, incompetent, immaterial, not within the issues of this case.

(Testimony of Helen Merle Beverlin.)

The Court: Objection overruled.

Mr. Lavine: Exception.

The Witness: Well, I don't know about working for him as a prostitute.

By the Witness:

I have testified here that Joe Di Marzo gave me about \$200 to buy my ticket and other expenses to Honolulu on this trip in question.

Q. Did he also give you any money to buy a ticket for any other person?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: No, he didn't give me any money to buy a ticket for any other person.

Q. By Mr. Neukom: In your presence did he give to any other person, any other girl, money to buy a ticket to Honolulu?

Mr. Lavine: Same objection.

The Court: Same ruling.

Mr. Lavine: Exception.

The Witness: I can't recall just whether he did. I [118] think, to the best of my recollection, that there was one other person that was given money.

By the Witness:

I did have some talk with Joe Di Marzo before I set sail when I talked about Viola sailing to Honolulu with me. That was about a week before I sailed to Honolulu.

(Testimony of Helen Merle Beverlin.)

Q. By Mr. Neukom: Well, was that prior to your sailing in January of 1941?

Mr. Lavine: Same objection, your Honor.

(The previous objection was on the grounds of being leading and suggestive.)

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: Yes.

By the Witness:

That was about a week, perhaps two weeks before. I am not sure where the place was, I think it was here in Los Angeles. I believe Joe and I were the only ones present.

Q. Well, then, what did you say, if anything, with regard to Viola? Or what did Joe say?

Mr. Lavine: Objected to as irrevelant, incompetent, immaterial, not within the issues of this case.

The Court: Overruled.

Mr. Lavine: Exception.

By the Witness:

I think I suggested that she go along because she was [119] a friend of mine and that I would like for her to go. I can't recall the conversation that came up. I had already purchased my ticket.

Q. Did you at any time see Joe Di Marzo give any other girl any money to purchase a ticket to go to Honolulu?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial.

(Testimony of Helen Merle Beverlin.)

Q. By Mr. Neukom: Give any other girl money around about January, 1941?

Mr. Lavine: I object to that as immaterial, irrelevant, incompetent, not within the issues of this case.

The Court: Overruled, without prejudice to a motion to strike.

Mr. Lavine: Exception.

The Witness: Well, I can't truthfully say I can remember seeing him give any other girl the money.

By the Witness:

I did have some conversation with Joe Di Marzo in the month of January, 1941, with regard to the fact that another girl had decided not to go to Honolulu.

Q. Now, relate that conversation.

Mr. Lavine: I object to that as irrelevant, incompetent, immaterial, not within the issues of this case.

The Court: There is no foundation laid. Otherwise the objection is overruled.

Mr. Lavine: Exception. [120]

By the Witness:

I guess it was around two weeks before purchasing the ticket. To the best of my memory, the young lady was present, Mr. Di Marzo and myself. I can't recall the name of the other young lady exactly. All I know her by is Dolly.

Mr. Lavine: May it be understood that I have a running objection to this?

(Testimony of Helen Merle Beverlin.)

The Court: Yes, it may be understood you have an objection to the entire line of questioning.

Mr. Lavine: On the grounds they are irrelevant, incompetent, immaterial.

The Court: The ruling will be the same and an exception will be noted to each one.

By the Witness:

The conversation came up that she had someone, a relative of some kind, that was in the Navy, I believe, in Honolulu, and perhaps it wouldn't be wise for her to go. I remarked that I didn't think it would be wise for her to go either. I can't recall just all the conversation. It's been quite some time. She had already purchased her ticket, and I suggested that the girl known as "Viola" go, because she was a friend of mine and I wanted her to go. Before that conversation I had been present with Dolly and Joe when there was discussion about Dolly and I going to Honolulu. I don't recall just where it was. It was in Los Angeles. I can't recall the exact time. It must have been [121] maybe two weeks before—it was before the purchasing of the tickets.

Q. At that time when you and Dolly and Joe were present—did you see Joe give to Dolly any money?

Mr. Lavine: Objected to as irrelevant, not within the issues of this case.

The Court: Overruled.

The Witness: Well, I can't recall seeing him actually give her the money.

(Testimony of Helen Merle Beverlin.)

By the Witness:

He gave me some money at that time. He gave me enough money to purchase my ticket. I was present when Dolly purchased a ticket.

Q. Do you recall whether you purchased her ticket or whether she purchased it from monies that she had?

Mr. Lavine: Object to that as irrelevant, incompetent, immaterial, not within the issues as alleged in the indictment.

The Court: Overruled.

Mr. Lavine: Exception.

(The following remarks were made at the bench outside the hearing of the jury:)

Mr. Lavine: I object to the introduction or presentation of any testimony relating to the purchase or use of a ticket or tickets as being a separate and distinct offense under the Act and not alleged, however, in this particular [122] indictment.

The Court: Objection overruled.

Mr. Lavine: Exception noted.

JOAN DAY

recalled as a witness by and in behalf of the Government, having been previously sworn, was examined and testified as follows:

Redirect Examination (Resumed)

By the Witness:

About two weeks before January 25, 1941, I was

(Testimony of Joan Day.)

introduced to a person by the name of "Viola" by Joe, at Gail's and Manny's on Oakwood, in Los Angeles.

Q. Then after you were introduced—what did Joe tell you when he introduced you? Just relate what was said, if anything.

A. Nothing. He just introduced me.

Mr. Lavine: Objected to as incompetent, irrelevant, immaterial, not within the issues of this case.

The Court: Overruled, without prejudice to a motion to strike.

Mr. Lavine: Exception.

By the Witness:

He said, "Joan, I would like you to meet Viola." That is all he said. Later on, on that occasion, I talked to Joe with respect to Viola. After I came back later that evening I asked him where he got that old bag from. He said that [123] she had called him a couple of nights ago or the night before, or something, and said her name was Viola, and that she had heard that he was a very prominent man and that he had very pretty girls, and she wanted to come to work for him. He says, "All right, you come on over." He says, "Let me take a look at you. Let me meet you."

Mr. Lavine: May I interpose an objection to all this as incompetent, irrelevant, immaterial to the issues on trial here.

The Court: The same ruling. Overruled.

Mr. Lavine: Exception.

(Testimony of Joan Day.)

Mr. Lavine: I have a continuing objection, your Honor?

The Court: Yes.

Mr. Lavine: Exception noted.

By the Witness:

So he brought her over to the house, and he said that she was so terrible looking he wouldn't even think of keeping her as one of his girls here in town. But he said he could send her over to Honolulu with Judy at the same time Judy went and that he could still get money from her. That is all in January, 1941. That was before Judy Bradford sailed for Honolulu.

Recross Examination

By Mr. Lavine:

This conversation that I related did not take place in August, 1940. I could have been in September, 1940. I met [124] Joe in December, 1940, and I had been here just about a few weeks, maybe a month before. It could not have been in 1941 that this took place (in August of 1941), not if she sailed with Judy on January 25th.

Q. Well, now, Judy sailed in August of 1941 to Honolulu. Could that conversation have taken place then?

A. But she didn't sail in August.

By the Witness:

I know that, because I wasn't working for Joe in August. I don't really have any recollection of the

(Testimony of Joan Day.)

dates of the conversation, but I know the months, but I don't know any of the dates.

I was taken into custody the last part of July. I didn't hear at the time that I was taken into custody and while I was in custody that Judy was then in Honolulu. I mean there was rumors about everything, and I don't really know because I hadn't seen Joe for some time then.

I asked Joe where he got that old bag. That was what I said. I never saw her again after that night. I only saw her on the one occasion.

Redirect Examination

By Mr. Neukom:

I went to work for Joe in December of '40. I quit in '41; right after Easter in April. I talked to Joe about Viola on more than one occasion other than the time when I met her. I talked to Joe about Viola's trip to Honolulu [125] upon more than one occasion. The other time besides the one that I have related was at 712 South Garland, Joe and I were present—it was about a few days before they sailed in January. Joe said that Judy told him that she didn't think Viola was going to give Joe all her money because Joe wasn't treating her right, wasn't buying her all the things that he bought his girls and said that she was only going to give him half. And Joe said that he was telling Judy to work on Viola so he could get all of the money.

HELEN MERLE BEVERLIN

previously called as a witness by and in behalf of the Government, having been previously duly sworn, was examined and testified as follows:

Redirect Examination (Resumed)

By Mr. Neukom:

Q. Now, Judy Bradford, did Viola, or Diane Stevens in fact sail with you on the Lurline on or about January 25, 1941, for Honolulu?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: Yes, I believe that is the correct date.

By the Witness:

She was the same Viola that had been with me when I had had a conversation with Joe Marzo a couple of weeks [126] before I sailed. This Viola or Dianne Stevens did not ever sail with me again, so far as I know, on any other trip to Honolulu.

Q. Now, when you arrived in Honolulu did Viola or Dianne Stevens accompany you to the Palace Hotel?

Mr. Lavine: Objected to as incompetent, irrelevant, immaterial, not within the issues of this case.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: Yes. We went to the Palace Hotel,

Q. By Mr. Neukom: Did you observe whether

(Testimony of Helen Merle Beverlin.)

or not, within a short period after you had arrived in Honolulu in the year 1941, Viola went to work as a prostitute?

Mr. Lavine: Objected to as called for a conclusion of this witness as to what Viola did.

The Court: I think she is qualified as an expert. Objection overruled.

Mr. Lavine: Exception.

By the Witness:

She worked in the same place I did. Before the trip of January 25th, 1941—I had been working here in the States for Joe Di Marzo, sharing the proceeds of my earnings with him.

Q. Now, had you ever made a previous trip to Honolulu in the year 1940? Just “yes” or “no.”

Mr. Lavine: Objected to as irrelevant, incompetent, [127] immaterial, not within the issues here.

The Court: Overruled.

Mr. Lavine: Exception.

The Court: Subject to a motion to strike if it is not connected up.

Mr. Lavine: And the previous question, your Honor, I didn’t reserve my objection to that on her sharing the earnings. I object to that and move to strike the answer as incompetent, irrelevant, immaterial, not within the issues here.

The Court: Motion denied.

Mr. Lavine: Exception.

The Witness: I can’t remember the correct dates, but I made a previous trip.

Q. By Mr. Neukom: Was it in the year 1940?

(Testimony of Helen Merle Beverlin.)

A. Yes, I believe so.

Mr. Lavine: May I have a running objection to all these these three trips so that I won't have to interrupt counsel?

The Court: In order that your record may be clear, it is understood that you will be deemed to have objected to all questions which relate to any activities of this witness or any other person or of the defendant prior to January 24, 1941.

Mr. Lavine: And also subsequent, your Honor. There will probably be some testimony elicited along that line.

Well, I will stand on that objection at this time, [128] with the exception noted.

Q. By Mr. Neukom: Well, now, on this previous trip to Honolulu in 1941 do you recall what month it was you had returned to California from that trip?

The Court: So that your objection will be clarified, your objection will go to all testimony which comes under the general heading of similar transactions.

Mr. Lavine: That is right.

The Court: Either before or after.

Mr. Lavine: Exception noted.

The Witness: I can't recall exactly, but I believe it was around October. I am not sure.

Q. By Mr. Neukom: 1940?

A. I believe so.

(Testimony of Helen Merle Beverlin.)

By the Witness:

To my best recollection I sailed for Honolulu around September, 1940. I had been over there around two, maybe two and a half months. It was possibly from the late summer until sometime in October, 1940.

Q. Well, incidentally, before I go into that, you made more money gross practicing your trade in Honolulu than you had made here in the States per day?

Mr. Lavine: I object to this as calling for a conclusion.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Witness: Yes. [129]

By the Witness:

There was a great difference between one trip and the other when I would work each day as to the amount I would average. On my first trip in the fall of 1940, I had averaged \$30.00 to \$50.00 a day gross, working in Honolulu. After I returned until I went on my second trip I had averaged, from practicing my trade here in the States, around fifteen, twenty per day, gross. I made more money in Honolulu than I did here.

Q. Before you left on your first trip to Honolulu, sometime in either the late summer or fall of 1940, prior to that had you been working for Joe Di Marzo and sharing the proceeds of your earnings with him? Do you understand the word "prior"? I will use the word "before." Before that had you been working for him?

(Testimony of Helen Merle Beverlin.)

Mr. Lavine: I object to that as not within the issues of this case.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: Yes.

Q. By Mr. Neukom: As a prostitute?

Mr. Lavine: I assign the asking of it as prejudicial misconduct, as relating to another alleged offense, not alleged in this indictment and referring only to state transactions.

The Court: Overruled.

Mr. Lavine: Exception. [130]

A. Yes.

By the Witness:

Before I left on my first trip in the fall or late summer of 1940 I did talk to Joe Di Marzo about going over there. I don't recall just where. It was in Los Angeles. I can't recall whether anyone was present or not.

Mr. Lavine: Is my objection still running, your Honor, on this?

The Court: Yes.

By the Witness:

Mr. Di Marzo gave me the money to buy my ticket. That was my first trip to Honolulu. I don't recall the exact amount he gave me. I imagine it was around two hundred, two hundred fifty dollars. I myself bought my ticket. Before I went on my first trip to Honolulu in 1940 Joe Di Marzo did not owe me any money. While I was over in Honolulu on my first trip

(Testimony of Helen Merle Beverlin.)

for two or three months there, I practiced prostitution in Honolulu. I did not do anything else for money other than that. When I returned I brought back money on my first trip. When I returned in October of 1940, I saw Joe Di Marzo shortly after I returned. I saw him in Los Angeles, I believe. I can't recall just where it was on that first trip. I do not recall what name I went by when I traveled on the steamer on the first trip. I gave Joe Di Marzo money when I got back from my first trip in 1940. I recall having given to him about \$900.00. All [131] that money had been derived from practicing prostitution. I had made more money than that while I was over there. I paid my expenses back and other expenses while I was over there from money I had made practicing prostitution.

Recross Examination

By Mr. Lavine:

I was living at 618 South Detroit Street in 1940 and 1941 under the name of Bradford. I have gone by the name of "Taylor." It could be possible that I was living at that address under the name of "Judy Taylor." I used several different names, and it's kind of hard to recall.

I couldn't identify this handwriting (indicating). I did receive mail at the Palace Hotel in Honolulu. I was known at the Palace Hotel as "Lani Nevins." I picked that name out myself. I don't remember when I did, whether it was on the boat or when I arrived or what. I didn't give my name to anyone in California before I had used it in Honolulu that I re-

(Testimony of Helen Merle Beverlin.)

member. That was the name that I used all the time that I was in Honolulu. That is what other people knew me by over in the Islands. Before I left in January, Mr. Di Marzo and I had quarrelled once in a while.

I remember an occasion when I first saw a girl, who called herself "Joan Day." I don't remember the exact date. I remember seeing her. I don't remember that on that occasion I was very much upset because I saw Joe Di Marzo with [132] her. Chances are I might have been upset. I don't recall crying about it. I might have. I don't remember having a conversation with Mr. Di Marzo after I saw him with Joan Day in which I told him that I was going away. It seems as though after that episode I moved out of my apartment, and then I moved back in again. I moved out of my apartment for one night, and I moved back in again. I believe it was on Detroit Street. On that occasion I probably mentioned to Mr. Di Marzo that I was going to go away. I wanted to return to Honolulu. I wanted to return to Honolulu on my own accord. I wanted to return to Honolulu. That was because I myself wanted to go. It wasn't because of anything Mr. Di Marzo told me to do. He didn't want to me go to Honolulu. He told me once he would rather I didn't go. He told me he did not want me to go to Honolulu.

Q. Didn't you have an argument about the subject when he told you that he didn't want you to go to Honolulu, that you were doing all right in the United States?

(Testimony of Helen Merle Beverlin.)

A. Yes. And I wanted to return.

Q. And you told him that in spite of anything that he said or did you were going back, didn't you?

A. That's right.

I don't recall the correct time, but I had worked in Bakersfield. I had made around \$200.00 while I was working in Bakersfield, just before I went to Honolulu.

I testified on direct examination that I received calls. I did not always make as much as \$25.00 and \$50.00 a call. I had several calls, though, during the month of January in [133] addition to my trip to Bakersfield. As to whether I had been working in a hotel in Bakersfield for a period of about eight or ten days, just before sailing—I don't know just how long I had been there.

Q. And you had turned over this money to Mr. Di Marzo to hold for you, hadn't you?

A. Yes. I had given it to Mr. Di Marzo .

Q. By Mr. Lavine: In January of 1941 you had turned over approximately \$200 to Mr. Di Marzo, isn't that right?

A. I don't know whether it was "approximately." I don't think it was that much.

I was working during the entire period of January, 1941, practically all of it. I had worked in the hotel in Manhattan Beach. I don't recall just when I worked there, but I worked there. From January 1, New Year's of 1941, until approximately January 24, 1941, I had been working practically steady during the entire period of time. During that period of time

(Testimony of Helen Merle Beverlin.)

what I averaged per day varied. Fifteen twenty, it always varied. I can't say approximately because every day was different.

The system was; the girl would work, and she would divide her money with the person that ran the rooming house. The balance, usually it would be given to someone else. I gave mine to Mr. Di Marzo.

Q. Well, when you went to Mr. Di Marzo in the latter part of January and you told him that you wanted to go back [134] to Honolulu, you knew then that he was holding or had or had received more money from you than you were asking him for the trip, isn't that right?

The Witness: I am not sure whether it was mine. I knew that I had given him money.

Q. By Mr. Lavine: Well you knew that you had given him more money than you were asking for you to take this trip, didn't you? A. Yes.

It was my own personal desire to make that trip. There was nothing that Mr. Di Marzo did do to have me go on that second trip. It was my own personal desire to go. That was because I had been at the Islands before. I liked it over there, and I wanted to go back again. [134-a] Mr. Di Marzo told me that he would rather have me stay here. I went down to the ticket office and purchased the ticket myself. Mr. Di Marzo was not along when I did that. I don't recall just how much luggage I took. The morning that I left I don't recall who called the taxicab. I wasn't alone. Mrs. Morgan, the landlady might have been around. I might have said to Mrs. Morgan at that time to lock

(Testimony of Helen Merle Beverlin.)

up my closet, that I had some clothes there that I wanted locked up. No, the closets were locked. I had quite a number of things there. I left some clothes. I don't recall how much clothes I left. I didn't take a lot of clothes. I had my closet locked up there. I think it was locked. I don't know whether I said to Mrs. Morgan that I was going to take a little trip up north to see my mother. A cab came and I got in the cab and went to the boat. Mr. Di Marzo didn't accompany me.

I think at that time he had a Cadillac automobile. I had ridden in his automobile on many occasions. He didn't drive me or transport me to the boat. I got my cab and went from my apartment on Detroit Street to the Lurline. Mr. Di Marzo didn't see me off. He didn't accompany me to the boat. As to whether, after I got on the boat, I changed my ticket from a first class to a second class ticket—I don't remember. I get my trips a little confused. I know I changed my ticket once, but I don't remember whether it was this trip that I changed tickets or not. [135] I made three trips to the Islands. Mr. Di Marzo had nothing to do with the other trip—the third trip. I came back from the third trip in November of this year, November of 1941. I believe that is correct. I went over to the Island on that occasion of my own accord also. That was because I wanted to go over there. I bought my ticket for that occasion myself also. I stayed over at the Island and came back of my own accord.

When I was over in the Island on my second trip, at no time did I ever send Mr. Di Marzo any money

(Testimony of Helen Merle Beverlin.)

from the Island. At no time did I ever receive any money to come back from that trip from Mr. Di Marzo.

Prior to my taking the second trip and prior to my taking any of these trips Mr. Di Marzo and I were friends. As to whether he had at one time proposed marriage to me—that was brought up several times. We didn't get married. Before I left in January I may have had a discussion with him in which I had asked him to marry me. I don't remember whether he said, "No," at that time.

I know where Mr. Di Marzo's apartments are. His apartments are Courts.

I don't recall seeing Mr. Di Marzo over there at the time I asked him for the money for the trip and singing "Thanks for the memories." I can't recall that I was going to leave and go away and had no intentions of coming back. My intentions were probably for returning. I don't even [136] remember the conversation about that or singing or humming or anything.

When I went down and bought a ticket I only bought a one-way passage. That must have been the ticket I bought under the name of "Bradford." If it was the second trip, I am sure it was "Bradford" that I used. I don't recall the name that I used the first trip, or the third trip.

Somebody questioned me in Honolulu regarding some investigation here in Los Angeles. I did not receive a request to come back to Los Angeles. The Chief of Police from Honolulu did not interview me

(Testimony of Helen Merle Beverlin.)

and ask me to come back. I did receive a letter from someone in Los Angeles, a man other than Joe Di Marzo, asking me to come back to Los Angeles. That was from a man by the name of Mr. Cherkoff, or something like that. No one told me to come back. I didn't receive a letter from anyone telling me to come back. I received a letter from someone asking me if I would return. It was personal, my own personal business. That was the third trip.

When I was over there during the second trip I did have a little trouble on the Island. I was told to leave the Island of Oahu. I had my trouble on the Island of Oahu. I left there. I Went to the Island of Hilo. I didn't come back to the United States. When I got back to the United States, I got off in San Francisco. I had met someone on the trip, coming back. That man's name was Mr. Goodsell. [137] As to whether I had a romance with him—I don't know whether you would consider it exactly a romance. He was a pretty good freinds of mine. He did proposition me to marry him. He proposed to me. I accepted his proposal for a while. I had some photographs taken with him. After I got off the boat I did not make plans to get married in San Francisco while I was in San Francisco, nor did Mr. Goodsell. In San Francisco I was not present when he telephoned his mother. In San Francisco I did not hear any conversation between him and his mother with reference to marrying me. I later came down here and met him at Wilmington. I went to the boat. When I came down from San Francisco I came down on the train.

(Testimony of Helen Merle Beverlin.)

I don't know just exactly what date it was, that I arrived from Honolulu. My return trip on that occasion: That was my own desire too. Nobody had asked me to come back on the second trip. Nobody had asked me to send any money from Honolulu. The second trip is when I came from Hilo to Honolulu. From Honolulu I returned back to California. This ticket that I bought from San Francisco to Los Angeles on the train, I paid for that myself.

Q. By Mr. Lavine: Well, at no time did Mr. Di Marzo cause you to go to Honolulu, did he?

Mr. Neukom: That is calling for a conclusion of the witness, and also upon the grounds it has been asked and answered.

The Court: Sustained, as calling for a conclusion of the witness. [138]

Mr. Lavine: Exception.

Q. By Mr. Lavine: At no time did Mr. Di Marzo cause you to return from the Island, did he?

Mr. Neukom: Well, I think, your honor, it is still a conclusion of the witness.

The Court: It is. Sustained.

Mr. Lavine: Exception.

By the Witness:

At no time did Mr. Di Marzo buy my ticket either way. I remained in Hawaii on the first trip that I took around two months. During the time that I was there I had to pay my living expenses. I lived in the Palace Hotel. I lived there as well as worked there. The custom there is the same as it is here, that you

(Testimony of Helen Merle Beverlin.)

share half of the proceeds of your earnings with whomever operates the hotel. Naturally I had other expenses. I would have taxicab fares to pay. I didn't keep track of it. Very seldom I ever went out to a night club. I had to pay for my room and board at the hotel. I paid that by the day. I think it was around \$3.00 per day. Two and a half, three dollars; three dollars fifty cents, or three dollars it was for my room. It was for my room and board. The other expenses I would have were expenses most anyone would have, buying clothes, and expenses that other human beings would have. I left with one suitcase on my second trip, and came back with four, and I happened to have needed a set of luggage; so I bought a set of luggage [139] I bought it in Honolulu.

Q. By Mr. Lavine: You always considered yourself a free agent to go wherever you pleased, regardless of anything Mr. Di Marzo might say or do, haven't you?

Mr. Neukom: I think, your Honor, that that calls for the conclusion of the witness as to what is a free agent. And I think that the facts, as pertain to this case, is a matter that is to be decided by the jury. I object on that ground.

The Court: Sustained.

Mr. Lavine: Exception.

By the Witness:

When I went to Bakersfield in January 1941, I went up there of my own accord. That was my own idea to go there. It was my own idea to come back and go to Honolulu. I wanted to go to Honolulu.

(Testimony of Helen Merle Beverlin.)

Q. There was nothing that Mr. Di Marzo could have said or done to have stopped you, was there.

A. I don't think so.

Mr. Neukom: Your honor, I object to that as being already asked and answered. The question is vague, too obscure. It doesn't place any particular time. It is unintelligible.

The Court: Sustained.

Q. By Mr. Lavine: Well, there was nothing that Mr. Di Marzo could have done in January, 1941, when you decided to make your trip to Honolulu, to have stopped you; was there?

Mr. Neukom: I object to that, your Honor, on the ground it is a conclusion of the witness.

The Court: Sustained.

By Mr. Lavine: Q. He did try to stop you, didn't he?

Mr. Neukom: I object to that upon the ground it has been asked and answered.

The Court: Sustained.

Mr. Lavine: Exception to the ruling on the last three questions.

The Court: You may have your exception.

By the Witness:

I have gone to other states on my own accord, at different times since I have known Mr. Di Marzo. I have traveled to different towns—that has been of my own accord.

I have received money from Mr. Di Marzo, that is, received money that I have turned over to him, re-

(Testimony of Helen Merle Beverlin.)

ceived it back. I have received money when I asked for things.

Q. By Mr. Lavine: Do you remember on December 4, 1940, Mr. Di Marzo gave you a \$100 check?

Mr. Neukom: I will stipulate that he did and that it bears her signature on the back, if you are willing to accept my stipulation.

Mr. Lavine: All right, I will accept the stipulation. I introduce that in evidence. [141]

(The Document referred to was marked Defendant's Exhibit "B" and received in evidence.)

By the Witness:

When I was first questioned about this matter and talked to the agents of the Federal Bureau of Investigation, I denied that Mr. Di Marzo had ever sent me or caused me to be sent to Honolulu.

I think I know Mr. George Stahlman. I remember that prior to your coming into the case he represented Mr. Di Marzo. I remember telling George Stahlman that at no time did Mr. Di Marzo ever send me over to Honolulu or cause me to be sent. I remember that I was arrested on the charge of conspiracy to cause my transportation to the Islands. I remember that the Government then put one witness on the stand—I believe it was Mr. Tyler here—and he gave his name, and then they rested their case. I was acquitted.

As to whether, after that, I was taken into the office and questioned at length—I can't remember

(Testimony of Helen Merle Beverlin.)

it. I did tell the F. B. I. agents before that proceeding that Joe Di Marzo had never given me any money. I do not remember the date of that. I can't remember talking to anyone in the F. B. I. prior to the day that I was in Court. I had to come to Court that day. I was told to be in Court. After I was in Court I went to my attorney's office. Mr. Cooper was my attorney. I did not come back to the Federal Building that day. I don't recall just exactly when, but it would seem [142] to me like it was some time after that when I came back to the Federal Building. I am not sure of the date.

I first talked to the Government agents about this case in the F. B. I. Building, I believe, at Fifth and Spring. I talked to Mr. Tyler. There might have been one other person present.

As to whether, on that occasion, I denied that I had ever given \$500.00 to Mr. Di Marzo—I denied everything. I saw Mr. Tyler again at my apartment. I don't recall just what date it was. It might have been a couple of weeks after the first time. There was a young lady I was living with was present, I think. Her name is Mrs. Coleman.

As to whether, on that occasion, I again denied to Mr. Tyler that I had received any money from Joe Di Marzo to make any trip—I denied everything when I wasn't under oath. I denied everything he asked me. I can't recall just which was the next time I saw Mr. Tyler.

(Testimony of Helen Merle Beverlin.)

Q. When was the first time that you changed your story from a denial?

Mr. Neukom: I object to that, your Honor, as assuming something that is not in evidence. And it is argumentative with this witness.

This witness has testified that she denied everything. Counsel has never attempted——

The Court: Argumentative. Objection sustained.

Q. By Mr. Lavine: Well, you lied to Mr. Tyler every [143] time you made these denials, didn't you?

Mr. Neukom: I object to that, your Honor. After all, that is for the Court and jury to ultimately determine. It is a conclusion of the witness as to whether or not she is a liar, and I think the jury are the best persons to judge that.

The Court: It is argumentative, counsel. Objection sustained.

Mr. Lavine: Exception.

Q. By Mr. Lavine: You were really telling the truth to Mr. Tyler, then, weren't you?

Mr. Neukom: Same objection.

The Court: Sustained.

Mr. Lavine: Exception.

By the Witness:

I don't recall whether Mr. Tyler took my statements down in writing or not. I have signed one statement, I believe. I don't know whether it was for Mr. Tyler. I signed one statement when I came down and gave my own statement. Someone

(Testimony of Helen Merle Beverlin.)

did not come to my apartment and take me down to the Federal Building. They did not call me up. I came down from my mother's, up in Boquet Canyon. I am now living at my mother's. That is my permanent address. I have been staying down here. I am staying at the Rosslyn Hotel. I have been staying there since the trial has been going on. Prior to that time I was staying at my mother's.

[144]

I have been held under a bond here. I have asked the Government from time to time if I could go to San Francisco. I believe I asked once if I could go. I have been around Los Angeles most of the time or in the city here.

When I came back the second time from Honolulu, I had traveler's checks. I might have had a little cash, very little. I couldn't recall just what amount it would be. I might have had cash. I am not sure just what name these traveler's checks were made out to. Maybe it was "Judith Bradford." I think they were cashed about three weeks after I came home. They weren't cashed immediately after I came home. I don't think it was as long as two or three months before they were cashed, but I couldn't say for sure. It was some time. I gave Mr. Di Marzo the traveler's checks, I believe, the night I got in from San Francisco. I am not positive about it, whether it was that night or the next day. It was one of the two.

I had not been drinking so particularly heavily on my return from San Francisco. It is a fact

(Testimony of Helen Merle Beverlin.)

that when I came down here that I wanted to go home to see my mother and that I cashed a check so that I could get my cab fare to go out to my house. I could have done that. It seems like—yes. I might have cashed one traveler's check. I think I cashed one traveler's check. I don't recall whether I used the money to go up to my mother's place or not. I didn't cash the other checks for some time after that night, [145] or after the next day. I cashed those checks at the bank on, I think it was, Seventh Street near Garland. There was \$500.00 in checks. I signed them all. I don't know what denominations they were. I think they were mostly in either fifties or hundreds. I can't remember just what they were.

When I was on the Island during the second trip I went swimming. I didn't go out socially very much. I enjoyed the Islands,—they were very nice. I enjoyed living on the Islands. I like to live there. It was more or less because I enjoyed living on the Island that I went there. I met a lot of people over there. I met quite a few men, but none that I became particularly interested in.

In my profession over there I was making \$3 a customer. That was the standard price that I received from all the customers. I can't recall whether I received the same price when I was working at Huntington Beach, California, or when I was working at Bakersfield. Perhaps, occasionally, I received \$5 and \$10 per customer at Bakers-

(Testimony of Helen Merle Beverlin.)

field. It is possible I received \$5 and \$10 per customer at Huntington Beach. I don't remember whether I received \$5 or \$10 per customer in Hawaii. There was never any set standard price, to speak. Prostitution is not licensed in Hawaii that I know of. I had an entertainer's license. As far as prostitution being licensed, I don't know about that. I paid a dollar for my entertainer's license. [146]

I went to a doctor of my own free will. Naturally, that would be an expense. The doctor charged. I don't remember what the doctor's expense per week was. I went to see a doctor usually once a week. I don't remember just what the expense was or for the different reasons that I went. I don't really remember whether it was a requirement of the place where I was working or not. I worked when I pleased on the Island.

As to whether there was an order of the Chief of Police that I could work only between certain hours of the day—I really couldn't say. I didn't see an order like that.

It is not a fact that I was ordered to leave Oahu because I was working after the hours which the Chief of Police had put into effect as the time within which women could work there.

Q. By Mr. Lavine: Had you violated certain orders of the police department of Honolulu while you were there on your second trip?

Mr. Neukom: I object to that as calling for the conclusion of the witness, and upon the further

(Testimony of Helen Merle Beverlin.)

ground that it is immaterial to the case here, upon the issue of transportation. And I further can say that in all probability prostitution is violating orders.

The Court: It is immaterial. The objection will be sustained.

Mr. Lavine: Exception. [147]

By the Witness:

I worked at the occupation of prostitution in Honolulu on my second trip there as many hours per day as I pleased. I didn't have any certain hours. I didn't have any certain schedule that I worked on. Some days I worked when I pleased and other days I didn't work. I was actually over on the Island during my second trip perhaps around two months. It took me about five days to travel each way. Going over, I didn't engage in my occupation as a prostitute on the boat, that I can remember. I traveled second class to the best of my memory.

After I got over there it was about three days before I began to engage in my occupation. I don't remember how many days of this period of time I didn't work. I didn't keep any record. Perhaps I worked about half the time.

When I came back on the boat I met David Goodsell. I don't remember whether I had met him before then or not. Perhaps I met him on the trip before. He might have paid me a visit. He was a bartender on the boat on my return trip. That is where I met him. After I met him and came

(Testimony of Helen Merle Beverlin.)

back to the United States; I recall having some pictures taken on the boat. I don't recall whether it was before or after he proposed marriage to me. When I started to San Francisco I don't remember Mr. Goodsell telephoning his mother. I do not remember standing right there at the telephone while he talked to his mother. Perhaps I had [148] been drinking in San Francisco. I probably was drinking. I don't remember just what I was drinking. It was probably a variety. I was drinking alcoholic beverages.

I don't recall whether I ever showed these traveler's checks to Mr. Goodsell. I don't remember whether I ever showed anybody those traveler's checks before I got to the United States. I couldn't say for sure what bank I purchased those checks from. It might have been the Bank of Hawaii. I don't remember how many times I signed my name when I bought the checks. I think I signed by name when I bought the checks. I don't remember. When I got to the bank at Seventh and Garland Street where I cashed the checks, I think I went to a window there. The bank looked like like it might have been a branch. I think the teller asked me for some identification. I probably produced some. I think the checks were under the name of "Helen Beverlin", I wouldn't swear to it. I probably had some identification on me under the name of "Helen Beverlin". I don't remember what denomination the checks were. I can't re-

(Testimony of Helen Merle Beverlin.)

member whether I cashed more than one immediately after I got to Los Angeles.

As to whether when I was working at Huntington Beach—I was earning between \$250 and \$300 per week—I don't remember the exact amount. I never had it long enough to pay much attention to it. I don't remember whether it was \$250 or \$300. It could have been that amount.

As to whether when I was working in Bakersfield I was [149] earning \$250 to \$300 per week there—I don't remember just what my earnings were. I wouldn't say whether it could have been that amount or not.

After I got back from Hawaii on my second trip I didn't immediately resume my previous occupation. I don't remember whether there was a month or two months there when I didn't do any work at all. All my bills and living expenses were paid. Mr. Di Marzo was paying them. I don't think those expenses ran between four and five hundred dollars a month, but I wouldn't swear to it. I did not necessarily feel that I had a legal obligation to pay that money back, for my expenses. I did not particularly feel that I had a legal obligation to pay that money back, for my expenses. I did not particularly feel that I owed that money. I didn't feel that the money that he was advancing for those living expenses then should be repaid.

As to whether, from time to time, I went to different places because I myself wanted to go to those different places during the years that I knew Mr. Di Marzo—sometimes I went because I wanted

(Testimony of Helen Merle Beverlin.)

to go and sometimes I didn't. I went to Phoenix, Arizona, because I wanted to go. Sometimes I have gone to Bakersfield because I wanted to go, and other times I went because Mr. Di Marzo wanted me to go. I preferred Los Angeles to any place, just because Los Angeles is a larger town. I like to live in a larger town, that is all.

As to whether I recently asked the F.B.I. if I could go to San Francisco—I didn't see anything wrong in that. [150]

I believe it was here I had those proceedings in the Federal Court in which I was acquitted that I made a statement to Mr. Tyler. I don't remember just when I made my statement. That was not because Mr. Tyler and other agents had told me that if I didn't make a statement to them that they would harass me wherever I worked. No statement like that was made to me by an F.B.I. agent. It is not a fact that that was because of fear of prosecution that I made the statements to the F.B.I. that I have made. I have never been afraid of prosecution in that matter. Mr. Tyler did not say that they were going to try me and simply acquit me so that I could make a statement without fear of prosecution. That statement was not made to me at any time. Mr. Di Marzo did not accompany me on the second trip or any trip to Hawaii. I never saw Mr. Di Marzo at any time that I was on the Island. As far as I know, during the four or five years I have known him, he has never been on the Hawaiian Islands.

(Testimony of Helen Merle Beverlin.)

Redirect Examination

By Mr. Neukom:

I have never taken any checks from customers in this business; only very seldom. I can't recall ever taking one, but once in a while there was one taken. More or less the business was on a cash basis. When I would give Mr. Di Marzo my earnings, as I had been practicing my profession, he did not keep a record that he gave to me, as a sort of [151] bank book and showed me how much credit I had with him. He never gave me a receipt for any monies that I gave to him.

Q. You testified under cross-examination in response to a question by Mr. Lavine that you might have made \$250 or \$300 down at Huntington Beach—per week down at Huntington Beach, but you never had it long enough to pay any attention to it. Why didn't you?

A. Because I gave it to Mr. Di Marzo.

Mr. Lavine: Objected to as calling for a conclusion. Irrelevant, incompetent, and immaterial.

The Court: Overruled.

Mr. Lavine: Not proper redirect examination. I move to strike.

The Court: The motion is denied.

Mr. Lavine: Exception.

Q. By Mr. Neukom: After you would make your money from your business about on an average per week how often would you turn it over to Mr. Di Marzo?

(Testimony of Helen Merle Beverlin.)

Mr. Lavine: Objected to as not proper redirect examination.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Witness: That would all depend upon when I would see Mr. Di Marzo. It would be maybe once a week or twice a week.

Q. By Mr. Neukom: Did Mr. Di Marzo inquire of you [152] as to how many customers you had had during that period that you had been working?

The Court: Which period are you talking about?

Q. By Mr. Neukom: During the period when you were working here in Los Angeles between your first and second trip?

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, too indefinite, not proper redirect examination.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: Well, he would never inquire particularly as to the customers. It would be more the inquiry as to the business, whether it was good or bad. If it was good, it meant there was enough customers. If it was bad, why there weren't many customers.

By the Witness:

When I was working for Marion Anderson up on Normandie, in the month of January, 1941,—I have seen Mr. Di Marzo in the apartment. I can't recall any conversation asking about the number of customers. As to whether Mr. Di Marzo

(Testimony of Helen Merle Beverlin.)

ever, during that period of time, in January of 1941, inquired of me as to whether or not I was turning over to him all of my earnings—there has been some doubt about that once in a while, whether I was. I wouldn't swear to this at all. I think he checked with Mrs. Anderson to make sure that I was giving him the correct amount. [153]

Q. Did Mr. Di Marzo ever say to you in the year 1940, between your first trip and second trip, anything as to what would happen to you if you didn't turn over to him your monies?

Mr. Lavine: Now, just a minute. I object to that as irrelevant, incompetent, immaterial, improper questioning, improper redirect examination.

The Court: How is that question opened up?

Mr. Neukom: I think it is opened up upon the field that this women apparently, from Mr. Lavine's questions, is shown to have been a free agent, that she could do as she pleased.

The Court: Objection overruled.

Mr. Lavine: Exception to the ruling.

The Witness: I can't recall him actually ever saying what would happen to me.

By the Witness:

After my second trip, when I got back around Easter of 1941 I was a little tired from having been over at the Island. From my experience, a woman cannot practice prostitution day in and day out, week in and week out, without some rest. It is a pretty trying ordeal. In the summer after my second trip and I had come back to California I

(Testimony of Helen Merle Beverlin.)

was in the hospital for a while. After that, before I went over to the Islands on the third trip, I wasn't on speaking terms with Joe Di Marzo for a while. I had some trouble [154] with him.

Q. By Mr. Neukom: Did Joe Di Marzo ever injure you after your return from your second trip?

The Witness: Yes.

Mr. Lavine: Objected to as irrelevant, incompetent, immaterial, not within the issues of this case. And I assign the asking of the question as prejudicial misconduct and ask that the question be stricken and the jury admonished to disregard it. It is an attempt to introduce some matters that certainly have no relation to transportation or causing to be transported. It is remote.

The Court: As I recall, there was considerable interrogation before we adjourned yesterday about this on cross examination, about this witness' third trip.

Mr. Lavine: That is correct.

The Court: And her going to Honolulu voluntarily.

Mr. Lavine: That is correct.

The Court: The objection is overruled.

Mr. Lavine: But nothing has been asked on cross examination which would open up any questioning along this line, your Honor.

The Court: The questions that were asked yesterday were directed to her as to whether or not Joe Di Marzo sent her or she went there of her

(Testimony of Helen Merle Beverlin.)

own free will on the third trip, which in my judgment opens up the question which the United States Attorney is now touching upon. [155]

Mr. Lavine: No. He is about to ask something that may involve another alleged offense not charged in this indictment and not a part of the issues here and beyond the scope of the cross examination and, certainly, improper redirect examination. I assign the asking of the question as highly prejudicial.

Mr. Neukom: The free agency angle, too, is one that I wish to urge, your Honor. It has been attempted to be brought out here, as I said before, that this women has always been a free agent.

The Court: The objection is overruled. Well, to keep the record straight, Mr. Lavine's motion will be deemed to be a motion to strike, in view of the fact that it came in after the answer, and the motion to strike will be denied and the exception granted to the ruling.

Q. By Mr. Neukom: And about how long after your second trip?

Mr. Lavine: Same objection, your Honor.

The Court: Same ruling. Exception granted.

A. Well, I couldn't say for certain but I think it was about, perhaps a month after my return. I wouldn't swear to a certain date.

Q. What did he do to you?

A. Broke my jaw.

Q. Were you in the hospital as a result of that?

(Testimony of Helen Merle Beverlin.)

Mr Lavine: I object to the last question and make a [156] motion to strike on the last answer, your Honor.

The Court: On the same ground previously stated?

Mr. Lavine: Yes.

The Court: The same ruling. In order to prevent you from the burden of repeating each time, it will be deemed that you have objected to the entire line of questioning of the United States Attorney which relates to any incidents occurring after her return from Honolulu on the so-called second trip and before her third trip, unless there is some additional ground which occurs to you and, perhaps, to that particular question.

By the Witness:

Yes, I was in the hospital for about two weeks. After that in the fall of that year I went to Honolulu again. I paid my own way on that trip.

Mr. Lavine: I object to all these questions as leading.

The Court: Well, they are all leading.

Mr. Neukom: Very well.

The Court: But I don't think that is sufficient grounds to strike them from the record.

Mr. Lavine: Exception.

By the Witness:

When I went to Bakersfield in December of 1940, Joe sent me up there. When I went to Manhattan Beach, and worked there, Mr. Di Marzo sent me there. I thought Manhattan and Huntington were

(Testimony of Helen Merle Beverlin.)

the same thing. Huntington has [157] been the one that there was reference to. I never worked in Manhattan. When I went to Huntington Beach, Mr. Di Marzo sent me there.

When I went to Huntington Beach, I gave the monies that I earned from practicing prostitution to Mr. Di Marzo. When I worked in Bakersfield, I gave the monies that I had earned from practicing prostitution to Mr. Di Marzo.

Q. It was brought out on cross-examination that you liked the Hawaiian Islands?

A. Yes. I also liked Los Angeles, and California.

Referring to a check in the amount of \$100 from Joe Di Marzo, dated December 4, 1940; On the back of which it says, "Judy Beverlin" and "O.K. J. Di Marzo." I don't remember to whom, if anyone, I gave this money after I had received this check. I don't even remember receiving the check. I cashed checks from time to time for Joe Di Marzo. I have gone to the bank and got checks cashed for Mr. Di Marzo. As to whether I recall whether or not I have ever received a check from Mr. Di Marzo and gone down to the bank at Seventh and Garland and Joe Di Marzo would okay my signature—I can't recall about the signature. I did it so seldom that I don't recall the procedure of it. I recall having given the money back to Mr. Di Marzo after I had cashed the checks.

Mr. Di Marzo did buy me clothes, and he bought me a coat. He has taken me out and wined and

(Testimony of Helen Merle Beverlin.)

dined me. And Mr. Di Marzo has ridden me in his beautiful Cadillac car. [158] But I also for about four years had given him everything I have made. I do not feel that I owe Mr. Di Marzo anything now. I still like Mr. Di Marzo. I am testifying here today because I am under bond and compelled to testify. I didn't want to testify. I told you on August 14 of 1942 that I preferred not to testify. You have not made me any promises at all in conjunction with my testimony on this case. Mr. Tyler has not made me any promises at all.

I don't know whether you would consider me his pal, but I don't dislike Mr. Di Marzo. Mr. Di Marzo has, upon some occasions, offered or suggested marrying me. I don't recall whether before I left on the trip in question, the second trip, and went to Honolulu he offered to marry me then.

Q. By Mr. Neukom: Mr. Lavine interrogated you with regard to your comments to Mr. Tyler or the F.B.I. agent before you made the complete statement, and you stated that you denied everything. Now, as a matter of fact, Miss Bradford, when you talked to Mr. Tyler in the spring of this year what did you tell him?

Mr. Lavine: Now, just a minute. I object to that as not proper redirect examination. She said she denied everything.

Mr. Neukom: Obviously, your Honor, denying everything is a matter which was a conclusion of the witness. I think I have a right to inquire.

(Testimony of Helen Merle Beverlin.)

The Court: The matter was opened up on cross examination, Mr. Lavine. The United States Attorney has a right to inquire if he desires. The objection is overruled.

Mr. Lavine: Exception.

By the Witness:

I told Mr. Tyler my name and a few other little questions he asked. And then I refused to answer any of the other questions. In the spring or early summer of 1942, I also refused to answer anything. I recall appearing before the Grand Jury. I stood on my constitutional rights. I refused to testify.

Recross Examination

By Mr. Lavine:

As to whether the quarrel that I had with Mr. Di Marzo about a month or two months after my return was occasioned by the fact that I wanted to go back to the Island, and he told me that he did not want me to go back to the Island—I really never could understand what the quarrel was actually about.

As to whether there had been some pictures taken of me with some Hawaiians—I took a lot of pictures.

As to whether there was a further discussion in which I said I wanted to go back to the Island, and Mr. Di Marzo said, “I told you I didn’t want you to go to the Island, and I don’t want you to go back to the Island”—Mr. Di Marzo didn’t want me to go. I don’t recall that he said [160] it right

(Testimony of Helen Merle Beverlin.)

at the time when that happened. He had said that he didn't want me to go.

As to whether there had been some discussions about some of the things that I had been doing over in the Island—Well, there had been discussions and mostly, I think, it was caused because I wanted to leave Mr. Di Marzo. I didn't want to be with him. I don't know whether I would have gone to the Island. I just wanted to leave him.

I was taken into technical custody by the District Attorney's office of Los Angeles County. When I came back from Honolulu the third time, Mr. Di Marzo was at my mother's house. He wasn't with any investigators. He was by himself up there. I had telephoned my mother, and he had just called up about that time, and he came up to my mother's house. When I drove up to my mother's, Mr. Di Marzo was up there. He told me that investigators from the District Attorney's office wanted to talk to me. He told me he wanted me to come back and testify for him. He told me that he wanted me to come down and talk to investigators from the District Attorney's office. He wanted me to talk to the District Attorney.

Two men from the District Attorney's office picked me up in my hotel when I was walking in the lobby. I think this is the Los Angeles County District Attorney. Other than that occasion, since that time, I saw Mr. Di Marzo in Sacramento. It was just after I went up to the District [161] Attorney's office. I haven't seen Mr. Di Marzo since

(Testimony of Helen Merle Beverlin.)

he was put in the concentration camp. I had seen Mr. Di Marzo when he came into town just before they put him in, about two days before they put him in the concentration camp, but I haven't had any personal contact with him. I haven't been out socially with him or talked to him or worked for him.

I got back from Hawaii on my third trip either early in November or just before November, 1941. I saw Mr. Di Marzo the day after my boat docked from the third trip to Honolulu. I went up to my mother's and he was there. I saw him up in Sacramento. I saw him down here when he came down to be put in the concentration camp. I don't remember exactly the date. I haven't seen him or visited him up there. I have never seen you before this case. I have never talked to you.

I know a person by the name of Jack Cherry. I have been engaged as a prostitute since August of 1941. I don't remember turning any earnings over to Mr. Cherry.

I can't recall a man named Pete Parks. I don't know whether I met a man named Pete Parks in Honolulu. The name doesn't sound very familiar. I met an awful lot of people in Honolulu. I can't remember visiting Pete Parks under the name of "Pete Parks" in San Francisco. I didn't have photographs taken with Pete Parks in Honolulu as I know of. I took a lot of pictures. I don't remember any certain pictures. [162] —Or a certain person.

(Testimony of Helen Merle Beverlin.)

I have been engaged in my profession as a prostitute since August of 1941, now and then. I have not been turning my earnings over to anyone.

I might have gone to a bank and cashed a check of Mr. Di Marzo. I remember going to a bank and getting some money for Mr. Di Marzo on a couple of occasions. I guess I cashed checks to get it because I am not very well acquainted with banks. I did not have to identify myself when I went to the bank. I think Mr. Di Marzo either sent his little book along with me or some kind of his identification. As to whether those were small checks like ten or eleven dollars—I couldn't say what the denomination was. I don't remember ever receiving \$100 for my own personal use all at one time from Mr. Di Marzo. I did not buy clothes that cost \$100. I never bought anything that cost \$100 as far as a dress was concerned. I didn't buy any fur coats. Mr. Di Marzo bought them for me. Mr. Di Marzo bought me a fur coat once. He bought me a watch. He bought me a few dresses and a few suits. I am friendly toward Mr. Di Marzo.

I think I sent letters from Hawaii addressed to myself in Los Angeles. I think that that was the arrangement, as best I can remember. It was over to the Detroit Apartment, the one Joan Day moved in after I moved out. I was not jealous about Joan Day moving in. She is a very nice girl.

(Testimony of Helen Merle Beverlin.)

Redirect Examination

I have never known Mr. Jim Crawford until about a week or so ago. I have never known you until the early part of August of 1942. And only in an official capacity.

Recross Examination

I couldn't say who Mr. Lazarus was. I don't remember him. I talked to a lot of people. I don't know whether they were government prosecutors or what they were. I don't think I have been on the 6th floor of this building, the office of the United States District Attorney, prior to seeing Mr. Neukom. I have been in the Grand Jury room. I can't recall whether I talked to some deputies on that floor when I was there. I might have. That has been some time ago. I can't remember the exact date. Perhaps around April.

I have not talked this case over with Joan Day since I have been down here. I don't recall talking to her in the witness room. I might have said, "hello" to her. I don't recall conversing about this case or anything. Nobody talked over her testimony with me. Mr. Tyler did not talk over her testimony with me, or show me her testimony. I wasn't shown or it wasn't discussed with me. I don't remember what day or date I was on the 6th floor of this building at the office of the District Attorney.

The Court: The witness may be excused?

(Testimony of Helen Merle Beverlin.)

Mr. Neukom: The witness may be excused, your Honor, until the conclusion of the case. [164]

The Court: And will be subject to call. You will remain, subject to call, until formal order is made releasing the bond excusing you.

Mr. Neukom: I should like to offer at this time Govern- [164-a] ment's Exhibit No. 2 for identification. I offer it in evidence at this time.

(The document referred to was marked "Government's Exhibit No. 2" for identification, and received in evidence.)

GEORGE REED

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crawford:

I am an investigator, Nick Harris Detective Agency. I know Joe Di Marzo. I have known him quite some time. I have known him and I know him to say hello. I don't know him very well.

I know Judy Bradford. I have known her just for a short while. I have had occasion to visit the defendant at his address at 712 South Garland Avenue. The first time I met Judy Bradford was when she arrived. I don't know for sure where from. I had occasion, after her arrival, some

(Testimony of George Reed.)

months thereafter, to visit Mrs. Bradford in the hospital.

I was present at 712 South Garland Avenue at which time a conversation was had and Judy Bradford and Viola were discussed by the defendant. I have no idea of the approximate time. It was quite some time ago. There was a number of people there. I don't remember who. [165]

Q. Now, will you state the conversation, just what Di Marzo said or what you said?

A. Well, that is pretty hard to do.

Mr. Lavine: Just a minute. I object to that as irrelevant, incompetent, immaterial, not within the issues of this case.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Witness: I don't remember what the conversation was or who it was said to.

By the Witness:

The conversation was that Mr. Di Marzo had sent the two girls to Honolulu.

Q. Did the defendant make a statement?

A. In substance that was the conversation.

Mr. Lavine: Just a minute. I object to that as a conclusion of the witness. I move that the answer be stricken.

The Court: Motion denied.

Mr. Lavine: Exception.

Q. By Mr. Crawford: Did he give the names of the parties, or were the names of the parties in the discussion? A. Yes, sir.

(Testimony of George Reed.)

Q. Who were the parties named?

A. Judy and Viola.

Mr. Lavine: May I make a motion to strike those last two answers on the same ground as heretofore? [166]

The Court: Yes.

Mr. Lavine: As irrelevant, incompetent, immaterial.

The Court: Motion denied and exception granted.

Cross Examination

By Mr. Lavine:

My name is George Reed. It is not a fact my name is Kliman. My adopted name is Reed. I was adopted when I was a child. My true name is Kliman, but my adopted name is Reed. I am known under both names. I am not necessarily generally known under the name of Kliman.

I couldn't say what night it was that I heard this conversation. I have no idea what month it was. It was in the past year or so. This conversation was in Mr. Di Marzo's residence. I don't remember who else was present—a number of people. I had not been drinking. I may have had a drink. I don't think I had had two or three drinks. Everybody in the party was drinking. Mr. Di Marzo was in the living room when I heard this conversation. I do not remember what month it was. As a matter of fact, I didn't pay much attention to the conversation. I was not having a social evening that evening. I had stopped by.

(Testimony of George Reed.)

I can't say for sure how long I remained. Not long.

I am working for Nick Harris now. I was not taken into custody in the investigation of the District Attorney's office. The District Attorney's office did not take me in and take a statement from me in connection with their [167] investigation of vice and corruption. I talked to Grant Cooper of the District Attorney's office. I don't know if Mr. Di Marzo had told him about me or not. I have met Mr. Grant Cooper. I know him as the Chief Deputy District Attorney of Los Angeles County. I had a conversation with him. I never made a statement. He did not ask me about my activities and the activities of various police officers whom I knew. I don't think he asked me if I knew certain police officers named Bill Jolin and Dave Conlee. He knew that I knew them. He did not discuss my having brought about the arrest of various persons in connection with members of the Los Angeles Police Department. I think he asked me about any information that I might know in connection with the Sasso-McGonigle case. I didn't know the people.

As to whether the night that I heard this conversation in the apartment of Mr. Di Marzo Judy Beverlin came in intoxicated—if I remember right, she wasn't there. She may have been. The only time I saw her was the night she came in. If that is when she came from Honolulu, it's the first time I met her. She was not intoxicated then. Mr.

(Testimony of George Reed.)

Di Marzo told me that Judy was having a love affair with a Kanaka on the Island.

Redirect Examination

By Mr. Neukom:

Mr. Di Marzo showed me some pictures that he said he [168] had found in her belongings of a Philipino or something; that he felt very bad about it and thought that there was something going on between them. From his conversation I would believe that he hadn't heard from her for a long time.

(At this point the Government rested its case.)

Mr. Lavine: May it please the Court, before I make my motion for a directed verdict, I have asked for the privilege of recalling Judy Beverlin for a little further cross-examination, and she is not present. I would like to reserve that right. I do not think it would in any way make any change in your Honor's ruling on my motion for a directed verdict, and I am prepared to go ahead and argue the motion at this time.

The Court: I think all the evidence should be in on a motion for a directed verdict, because I can't grant or deny a directed verdict on what might or might not be proven.

Mr. Neukom: I cannot anticipate what is in Mr. Lavine's mind, and, consequently, when she was excused, I told her she would not have to show up again until 1:00 o'clock tomorrow. I have

telephoned her bondsman to try to get hold of her, but where she is I do not know. The woman told me she wasn't feeling very well. She has got a bad cold.

The Court: She wouldn't have time to get back to Huntington Beach. [169]

Mr. Neukom: She might be on the way to Honolulu; I don't know.

The Court: Your motion is not in order. You have either to make up your mind, Mr. Lavine, whether you want Judy Beverlin back, or a motion for non-suit.

Mr. Lavine: I want her back, your Honor.

Mr. Neukom: I know of no way of assuring you I can reach her this afternoon.

The Court: I think you will probably have to call her as your witness, if you want her back. In any event, your motion for non-suit is denied.

Mr. Lavine: In view of her attitude, would your Honor permit me the indulgence of treating her by cross-examination in my questions?

The Court: It will have to be determined by the questions you ask, the nature and character of them, at the time. I will say this, Mr. Lavine: any ruling I might make with respect to that will not be governed entirely by the witness' statement that she was friendly to your client.

Mr. Lavine: At this time defendant moves for a directed [169-a] verdict on the ground that the Government has failed to establish its case under the indictment as alleged.

Now, it would hardly be necessary, it seems to

me, in view of the careful attention which your Honor has given in this case, to reiterate the evidence by which we contend that a directed verdict should be had at this time. Nevertheless, it appears to me, your Honor, that under the indictment as alleged, it is incumbent upon the Government to establish by sufficient evidence to overcome the presumption of innocence with which the defendant is at this time clothed, and was clothed throughout the entire trial of the case, that he either transported or caused Judy Bradford to be transported to Hawaii. That is the charge at this time in the indictment.

It further charged that he did do so for purposes of prostitution, and other immoral purposes, and debauchery. We have here no evidence whatsoever of transportation, so far as the defendant is concerned. I think that we may concede, so far as the question of transportation is concerned, he didn't convey her.

All the cases hold, insofar as transportation is concerned, that involves some carrier, some means of transportation: automobile, airplane, ship, or some other means of transportation.

The defendant did none of these things in this case. We are left solely with the proposition as to whether he [170] caused her transportation and, upon that premise, we are confronted with the testimony of Judy Bradford herself that she went of her own accord; that the defendant did not want her to do, and that in spite of that fact she did go.

Now, that, in substance, is her testimony, and

that is the Government's case, with the exception of certain other alleged acts or certain other alleged transactions with which the defendant was connected so far as the Government's testimony is concerned, but which in no way establishes either transportation, or that he caused the transportation of this witness Beverlin to Hawaii.

Where is there any evidence as to his having caused her to be transported? The word "caused" has a well known meaning under this particular Act. I have given your Honor an instruction on the definition of the word "cause" which was taken from a Mann Act case. It relates to some act or agency, something that is done, something that is more than merely as in an advisory capacity; something more than lending money.

Assuming everything that the Government has established as being without conflict; assuming, even though the Government witnesses who have conflicted themselves have established the thing they are seeking to establish, what evidence have we either establishing transportation or causing transportation in this case? We have the testimony that Judy Bradford had received \$200 prior to her having taken a trip, but there [171] is no persuasion or enticement or inducement or any other causation. This defendant was not an agent for her having gone over there. He didn't arrange any such trip. She went of her own accord. There was nothing to show that he, in any way, caused her to be transported within the meaning of the Act itself.

Your Honor is familiar with the testimony of all the witnesses and I will not summarize or presume to summarize all of them at this time. But, I feel under the evidence as has here been submitted, that it is insufficient to show that the defendant either transported or caused transportation in interstate commerce for the purposes of prostitution. I believe the other purposes are not advanced by the Government. The only purpose is prostitution.

It is true that they have established that she did engage in prostitution when she went to the Islands, but they didn't establish that was the purpose of her trip, or was that brought home, so far as the defendant is concerned, to him in this case.

And so, for those reasons, your Honor, I move for a directed verdict at this time.

The Court: Your motion is denied.

Mr. Lavine: Exception.

At this time, your Honor, there is certain testimony in which there were a number of reservations made during the course of the introduction of testimony. [172]

The Court: Yes.

Mr. Lavine: That concerned a motion to strike.

The Court: I do not think, under the law, you lose your right to make that motion if you request now to reserve it to the conclusion of the case.

Mr. Lavine: Very well.

The Court: It may be well, at that time, if you desire—I am merely suggesting it because you

may want to renew some other motions then, and the Government may, as well.

Mr. Lavine: I have to renew my motion for a directed verdict at the time? That is reserved?

The Court: That is correct, to reserve that; but I will consider that you have made a request to postpone your motion to strike until the conclusion of the whole case.

Mr. Lavine: Very well.

The Court: So that you may make it cover everything that is in.

Mr. Lavine: Thank you.

The Court: Does the Government have any motions to strike?

Mr. Neukom: None, your Honor.

DEFENDANT'S CASE

LAURA MORGAN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows: [173]

Direct Examination

By Mr. Lavine:

My occupation during 1941 and 1942 was apartment house manager at 618 South Detroit Street. I know Joe Di Marzo. I know a girl by the name of Judy Beverlin. I rented the apartment to Miss Beverlin November 4, 1940. Mr. Di Marzo was

(Testimony of Laura Morgan.)

with her at the time I rented her the apartment. They said they wanted an apartment, that they were going to be married in a week or two. They just looked like all the prospective brides and grooms, hand in hand, and looked very much in love.

Subsequent to that time, I saw Miss Beverlin from time to time. Mr. Di Marzo wasn't living there, just Miss Beverlin. I had occasion at one time to miss her being away from the apartment house. That was about a month or six weeks after she moved in. I saw her shortly after that. I saw when she came home.

Q. What did she say to you then, and what did you say to her?

Mr. Neukom: I object to that. Was that in the presence of the defendant?

Q. By Mr. Lavine: Was the defendant present at that time? A. No.

Mr. Neukom: I object to this. There has never been any proper foundation for the purpose of impeachment. [174]

Mr. Lavine: It is not offered for that purpose, your Honor.

Mr. Neukom: The statement of any witness to this case unless it is in the nature of impeachment, which was made out of the presence of the defendant, I do not believe is material to the case.

Mr. Lavine: It is for the purpose of showing why she was away, and as to her free agency, which we have gone into here on the record.

(Testimony of Laura Morgan.)

The Court: Well, but that's impeachment. The objection will be sustained.

Mr. Lavine: Exception to that ruling.

By the Witness:

Miss Beverlin was gone about two weeks. After she came back I learned where she had been. Miss Beverlin told me, when she moved in, in the presence of Mr. Di Marzo, that she was working at an automobile agency. I think she said it was the DeSoto Agency on Western. On this occasion, after she returned, after having been gone two weeks, she said something to me about going away again on a trip. That is, somewhere on or about January 24. I saw her on January 24, 1941. It was noon, or shortly thereafter. She was alone. I saw her leave. I didn't hear her call for a taxi cab. She had a 'phone in her own apartment. I saw this taxi cab call for her. I did see her leave on January 24, 1941. Mr. Di Marzo was not there at the time. She told me, when [175] she left, she was just going up north. I locked her clothes up in her apartment. I saw the clothes she had in the apartment. It was a very complete wardrobe; fur coats, jackets, and suits and hats, and shoes and all the things a woman has to wear. I locked them up. I locked the closet.

As to whether I ever saw any letters come to that apartment house addressed to Judy Beverlin—I saw one letter from the telephone company. As to whether Judy Beverlin ever received any other mail from January 24 until the apartment was

(Testimony of Laura Morgan.)

vacated—not to my knowledge. She did not get any, to my knowledge. I mean, I don't know whether she got any mail. I pretty well know. I meet our mailman practically every morning because a person has to be in the house about six months before he remembers their names, and I often help him in finding the parties he wants to give mail to. As to whether or not any mail came there addressed to Judy Beverlin—I don't know. I know this telephone company letter came, because they came over to me to see why the bill hadn't been paid, and they asked me if I knew the bill had come there; and it was in the box, we could see through the slits in the box, and they later got that. Aside from that one letter, I did not ever see any other letter addressed to Judy Beverlin covering the period January 24, 1941, until the apartment was vacated. I never saw any mail there from the time she came in. I never saw any mail addressed to Judy Beverlin, except that one letter [176] from the telephone company. The mail man did not ever inquire from me.

The name of this apartment is Ritz Wilshire. There are twelve apartments. They are doubles. There are two floors. Six above and six below. There is a front entrance and a rear entrance, and that serves all twelve. I never saw any other men visit Miss Beverlin in this apartment.

As to whether I know of a fight or a quarrel that took place shortly before January 24, 1941,

(Testimony of Laura Morgan.)

between Joe and Miss Beverlin—I wasn't a witness to it. I don't know what caused it, but Mr. Di Marzo called me on the 'phone from somewhere in the city. After I got a 'phone call from Mr. Di Marzo I saw Judy Beverlin. I told her that Mr. Di Marzo had called and was worried about her and wanted her to be sure and call him. I don't remember what she said.

Cross Examination

By Mr. Neukom:

My testimony about having not seen a letter received in Judy Beverlin's box also extended from the period from January until April of 1941. I was there as apartment manager during that period of time.

Q. Didn't you see another young lady occupy the apartment occupied by Judy Beverlin?

A. Yes.

Mr. Lavine: I object to this as not proper cross examination. [177]

The Court: The objection is overruled.

Mr. Lavine: Exception.

Q. (By Mr. Neukom): Who introduced you to her?

A. Mr. Di Marzo.

Mr. Lavine: Just a minute, now. That is objected to as not proper cross examination. There has been nothing brought out about any other person in there on direct.

Mr. Neukom: Counsel can't so severely limit

(Testimony of Laura Morgan.)

me, your Honor, when he extends over a period, when I have a purpose in inquiring.

The Court: I think so. I think counsel feels this examination covered the period she was manager, and also Judy Beverlin's leaving, and locking up her clothes, which opens that incident. I think it opens the door. The objection is overruled.

By the Witness:

I know her as Miss Taylor. I didn't know her as Joan Day until a day or two ago when I saw her picture. I know her as Renee Taylor. Joe Di Marzo introduced her to me. She did not look very much in love with the defendant to me. I can always spot a prospective bride and groom, when they come in the building, if that's what you mean, by my ability to decide whether they are in love or not. I am endeavoring to run a very reputable apartment. I would not have let Judy Beverlin in there if I had known she was a prostitute. Judy Beverlin told me she was working for some DeSoto Agency [178] when she came in. I don't know the exact date she left. I presume that was about January 24, 1941. It is rather cool, sometimes, around that time. She said she was going up north. She had left her fur coat in the closet.

These mail boxes that are there; they are just little individual boxes alongside of the wall, which the mail man comes to and drops letters in. I don't spend my time running around to see whether there are letters in a box. But I meet him out there so I can get my mail. He comes twice a day.

(Testimony of Laura Morgan.)

I do not go away and visit people very often. I don't stay around and watch every letter that comes in. Miss Taylor also had a key to the mail box, but her name wasn't on the mail box.

After Judy Beverlin left, Joe Di Marzo did not pay the rent for Miss Taylor. Miss Taylor paid it to me. Joe Di Marzo did not say anything to me about his going to get married to Miss Taylor, since Judy Beverlin had gone up north.

As to how I came to lock up her clothes—in the first place, at that time there was quite a lot of pilfering in the apartment house, and when I saw those beautiful clothes in there I thought it would be more adequate protection. Joe Di Marzo asked me to lock that closet. That lock was one that a skeleton key would go into, that is, the closet door—not a Yale. I have the key on my ring. I still [179] have it. Her clothes are not still locked up. I kept that key myself until she called for her clothes. She did call for her clothing. It must have been in May some time.

Redirect Examination

By Mr. Lavine:

As to whether she had three fur coats—I know she had three with fur collars. She had a fur jacket and one or two fur coats, and cloth coats with fur collars, as I remember it. I didn't see her have any coats when she left; and one bag. That is all I saw her take. I do not know what was in the bag.

PHILIP THOMAS TOWER,

a witness called by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am an investigator in the office of the district attorney in Los Angeles County. I have been an investigator in that office almost two years. I was an investigator in the office of the district attorney of Los Angeles County during an investigation being conducted by that office concerning vice and corruption in 1941, but not in 1940. I know Marion Anderson. I know Joe Di Marzo. In 1941 I was present at a conversation between Marion Anderson and Di Marzo, and I talked with her in the presence of Joseph Di Marzo. [180] There were people that came and went. I don't remember anyone present during the entire conversation. It was early in this year. It was during the Sasso-McGonigle trial in the Superior Court. I believe it was in February. The conversation took place in the office of the Deputy District Attorney, Miller Levy, on the sixth floor of the Hall of Justice.

Miss Anderson and I were in this office when Mr. Di Marzo came in. He says, "Hello Marion. I haven't seen you for a long time." He said, "I want to talk to you."

She said, "All right, Joe."

He said, "I understand you have been going around town telling a lot of lies about me and Judy

(Testimony of Philip Thomas Tower.)

Beverlin." He said, "I want to get the straight of it."

She said, "Why, Joe, I haven't talked about you and Judy Beverlin."

He said, "Oh, yes you have, because it has come to me from several sources." He said that I took some money from her when she came back from Honolulu." He says, "Marion, you know that is a dirty lie."

She said, "Joe, I never said anything like that. How would I know you did that?"

The conversation went on, and he told her something else he had been accused of, something about some jewelry. She denied that. She said, "I have always liked you. I don't know why you would think I would say anything about [181] you."

And she said, "I wish you would do something about Judy. I wish you would help me with Judy. She is going to the dogs, Joe, she is on the dope——"

Mr. Neukom: I object to this latter part. It is entirely self-serving and it has not been brought out by any witness and isn't proper subject matter to impeach.

The Court: You are correct. It may be stricken.

Mr. Lavine: The Government produced testimony regarding—there was testimony produced——

The Court: I am speaking now of the latter part, where the witness says the defendant said: "I wish you would help me with Judy Beverlin——

(Testimony of Philip Thomas Tower.)

The Witness: It was not the defendant; it was Marion Anderson.

Mr. Lavine: This was part of a conversation between this man and Marion Anderson in the presence of the defendant.

The Court: I understood Di Marzo said to Marion Anderson: "I wish you would help me——"

The Witness: No. Marion Anderson said she wished Joe would help her about Judy Beverlin.

Mr. Neukom: Marion Anderson wanted Joe to help Judy Beverlin?

The Court: Because Judy Beverlin what?

The Witness: Was on the dope. She said she was smoking marihuana. [182]

Mr. Neukom: Just a moment. I object to this testimony. It is obvious there is only one purpose in this type of testimony. It isn't the subject matter of impeachment. It is self-serving and hearsay, and I believe my objections are well made.

The Court: On all scores. The objection is sustained. The motion to strike is granted. The jury will be instructed to disregard it.

Mr. Lavine: Exception.

By the Witness:

I remember this in the conversation, of Joe Di Marzo making this particular statement to Marion. Marion had said to Joe, "Joe, you have always been a sucker when it came to Judy Beverlin. Certain people in the racket never could understand you. You have spent so much money on that girl——"

(Testimony of Philip Thomas Tower.)

Mr. Neukom: I object to all of this. It is very obvious it isn't proper subject matter of impeachment. It is very obvious what the purpose of the witness in testifying to this effect is. It has nothing to do so far as impeachment is concerned, and it would only be hearsay so far as this particular case is concerned.

Mr. Lavine: It is impeachment of Marion Anderson.

The Court: Well, I don't know that—on what basis? Bias or prejudice? Contrary statements? There wasn't anything here that Marion Anderson—

(Mr. Lavine refers to transcript.) [183]

The Court: While you are finding it, I will sustain the United States Attorney's objection. I will strike the answer and instruct the jury to disregard it and admonish the witness.

By the Witness:

I don't recall her saying anything about her going to Hawaii.

As to whether I remember at that time that Mr. Di Marzo in the District Attorney's office, that is, in Miller Levy's office, with just we three present, said that she heard that Miss Anderson had made some statements that he had taken \$500 from Judy Bradford after she returned from Honolulu and Miss Anderson said, "I never made any such statements"?—I don't recall the amount of money. I don't recall the \$500, but I recall her making that

(Testimony of Philip Thomas Tower.)

statement; that she hadn't said a thing about Joe having anything to do with Judy going to Honolulu. Mr. Di Marzo asked her if he said Judy Beverlin was going to Honolulu, and Miss Anderson denied any such thing and said, "I wouldn't know anything about it, anyway."

I subsequently had occasion to talk to Miss Anderson again. I believe I had talked to her in the County Jail.

There was something said in this conversation that I had with Miss Anderson and Mr. Di Marzo in the District Attorney's office about Mr. Di Marzo's having been in love with Judy Bradford. Mr. Di Marzo at that time and place said to Miss Anderson, "You know that I didn't know that Judy Bradford [184] had gone to Honolulu. That isn't exactly the same way he said it.

I subsequently saw Marion Anderson in the County Jail.

She did not subsequently make any complaint to me against Joseph Di Marzo.

Cross Examination

By Mr. Neukom:

Joe Di Marzo was cooperating with the District Attorney's office as early as October 2, 1941.

(Mr. Neukom hands document to counsel.)

Q. (By Mr. Neukom): You were present at the interview conducted by the Deputy District Attorney, Joseph P. Powers, in room 656, Hall of Justice, at 12:00 noon, October 2, 1941, where Joe

(Testimony of Philip Thomas Tower.)

Di Marzo was asked certain questions in your presence and in the presence of other people.

Mr. Lavine: To which I object, your Honor, as not proper cross examination. Nothing touched on in the direct examination to which he is referring now.

The Court: Objection overruled.

Mr. Lavine: Exception.

By the Witness:

I believe I remember that interview. At that time Mr. Joe Di Marzo was interrogated with regard to his knowledge concerning certain matters that were being investigated by the District Attorney. It is not true that at this time I talked to Marion Anderson in the presence of Joe Di Marzo [185] that I knew Marion Anderson had been convicted of a vice charge and was applying for probation. I believe you are mistaken on that point. I don't think at that time she had been convicted. If she had it wasn't to my knowledge that she was applying for any probation. I knew that Marion Anderson was the subject for a vice charge. We had her in custody. During that time Marion Anderson was in custody. Part of the time she was out on bail. Marion Anderson's charge was for operating here in this County on vice charges involving prostitutes and things of that nature. I was not concerned with any investigation of the Mann Act or interstate commerce.

As to how it happened that I permitted Joe Di

(Testimony of Philip Thomas Tower.)

Marzo to interrogate Miss Anderson at that time with regard to whether of not Judy had gone to the Islands and been sent thereby Joe Di Marzo—Well, both of them were on bail. They were waiting to be called as witnesses on the trial that was going on upstairs in the Superior Court. They had the perfect right. I wasn't assigned to watch them. They could have talked in front of me or they could have talked out in the hall and talked on any subject they desired. I couldn't restrain them. I was in Mr. Levy's office. Mr. Levy's office was upstairs. He was keeping the witnesses in his office as a sort of witness room. Mr. Di Marzo didn't testify. Marion Anderson did. Marion Anderson's testimony was stricken.

I have not been in that line of work many years. I have [186] only been in this line of work two years.

As to whether I can repeat now just what was said by Marion Anderson with regard to her knowledge concerning Judy Bradford's going to Honolulu—As I recall, there was nothing said about her going.

At first Joe Di Marzo was a little bit peeved. Later on it became a regular love feast. They told each other how much they thought of each other. He claimed he had love in his eyes but not for Marion Anderson.

(Testimony of Philip Thomas Tower.)

Redirect Examination

By Mr. Lavine

I had occasion to talk to Mr. Tyler about this case, on several occasions.

Q. (By Mr. Lavine): Tower, did you give the F.B.I. and Mr. Tyler the names of several other persons who were sending persons to Hawaii?

Mr. Neukom: Now, your Honor, that is obviously the vice. Because we haven't tried every person that might be guilty of an offense, why, we are derelict. I object to it, your Honor.

Mr. Lavine: Now, if your Honor please, the purpose of that offer is this: We have a right to show, under the Hysler case, that where there is a specialized prosecution or a certain person is singled out and others are not prosecuted in relation to a set of circumstances where the officers are singling out one individual—— [187]

Mr. Neukom: I object to this kind of argument along the lines he is now trying to develop because obviously, I think, it is a mistake. It may be that there are pending many cases of a like nature that I don't know about. We have some twenty odd deputies in our office, and I don't think it is at all proper to bring in anything here about any other case unless it is for the purpose of impeachment.

The Court: The objection is sustained, and the jury are instructed to disregard the remarks of Mr. Lavine and Mr. Neukom.

(Testimony of Philip Thomas Tower.)

Mr. Lavine: Now, may I make an offer of proof, your Honor, in order to complete my record? At this time I offer to prove that this witness would testify that he gave the F.B.I. and the Department of Justice the names of four or five other persons who, the investigation in the District Attorney's office had developed, were sending persons or getting persons to go to the Hawaiian Islands and that none of them have been the subject of prosecution.

Mr. Neukom: I object to the latter part of that because this witness obviously didn't know whether they have been the subject of prosecution or the subject of further investigation.

The Court: The offer of proof will be rejected. The matters, even if offered and proved, would be wholly immaterial.

Mr. Lavine: Well, exception noted. [188]

The Court: You may have your exception.

GRANT B. COOPER

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

My occupation with Los Angeles County is Chief Deputy, District Attorney. As such, during the

(Testimony of Grant B. Cooper.)

year 1941, I was conducting an investigation of vice and corruption in Los Angeles County, trying to get the higher ups. During the course of my investigation I talked to Joseph Di Marzo, defendant in this case. He assisted me in the investigation I was making. As a result of the information that he gave me and as result of that investigation the Court granted Mr. Di Marzo immunity. (It is understood that the reference is to the State Court.) It was based upon the recommendation of our office to the Court. I did not grant Mr. Di Marzo immunity. Mr. Di Marzo was told by me and also told in the presence of his attorney that if he assisted us in these investigations we would recommend, that is, the District Attorney's office would recommend, to the Court that the charges then pending against him—I believe the charges against him then pending were pandering, pimping and statutory rape—would be dismissed. And a motion was made before the Court and those charges were dismissed by the [189] Court. Generally speaking those charges grew out of the same transactions upon which later, convictions of other people were had. Marion Anderson, to the best of my recollection, pleaded guilty or was convicted. That is a conviction that was the result of that investigation. The investigation also aided me in the prosecution of others along the same line. I was seeking, through the help of Mr. Di Marzo, to reach some one in charge of vice at that time in the Sheriff's office.

(Testimony of Grant B. Cooper.)

Q. Was that person later transferred to the subversive squad or alien enemy squad of the Sheriff's office?

Mr. Neukom: "That person" is awfully indefinite. Furthermore, it hasn't any materiality to this case how the Sheriff runs his office or how Mr. Cooper runs his office.

The Court: Objection sustained. The jury is instructed to disregard the implications in the question.

Mr. Lavine: Exception noted.

By the Witness:

We located Judy Beverlin. I am the one who sought to locate Judy Beverlin. It is within my actual knowledge. I have the correspondence here with me.

Q. By Mr. Lavine: You communicated with Chief Horrall to locate Judy Beverlin, did you?

A. I communicated with Chief of Police Horrall on October 16, 1941, requesting him to make a request of the Chief of Police of Honolulu because I knew that they were acquainted. [190] And then in response that I received——

Mr. Neukom: I move that all this be stricken, your Honor, because obviously the best testimony as to any communication to the Chief of Police of Honolulu, if it is material, is the testimony of the Chief of Police Horrall.

The Court: I fail to see the materiality of the question.

(Testimony of Grant B. Cooper.)

Mr. Lavine: Well, it is material in this: That Judy Beverlin was later taken into custody for questioning through this procedure, and she was questioned——

The Court: What is the materiality of that?

Mr. Lavine: After she returned from Honolulu.

The Court: What is the materiality of that?

Mr. Lavine: It is to show that Joe Di Marzo knew nothing of her being in Honolulu, your Honor. The way they located her was such that Mr. Di Marzo didn't know she was there.

Mr. Neukom: Your Honor, that is confusing the case in the minds of the jury. I renew my objection. This is the third trip. There was no contention by the government that Joe Di Marzo had anything to do with the third trip. You will remember the quarrel intervening between——

The Court: All right. Objection sustained.

Mr. Lavine: Exception.

The Court: The testimony so far given in response to the last question and the answer of the witness is stricken and the jury instructed to disregard the entire question by [191] Mr. Lavine.

By the Witness:

I saw Judy Beverlin after she returned to the United States. I had her questioned before she returned to the United States.

Q. Did you request any one in the Hawaiian Islands or elsewhere to question her before she returned to the United States?

(Testimony of Grant B. Cooper.)

Mr. Neukom: Obviously, if there was any interrogation of Judy Bradford in the Hawaiian Islands, unless Mr. Cooper was present, the person who was present at that time is the only one who can testify. This is hearsay.

The Court: I fail to see the materiality of that, counsel. Is this an impeaching question?

Mr. Lavine: No, your Honor.

The Court: Are you laying a foundation for impeachment?

Mr. Lavine: No. This is the defendant's case, and this is the purpose of it: we have various trips that this girl took and we have a right to show that she was a free agent; that she went over there of her own accord.

The Court: That she made some statements or admissions?

Mr. Lavine: Well, she made some statements there.

The Court: Is that the purpose of this? You are laying a foundation for that?

Mr. Lavine: No, I am not laying a foundation for the statement. I am laying a foundation of the fact that she [192] was there of her own accord, that she came back, that she was there on the third trip and that the defendant didn't know that she was there. Now, that is the purpose of this particular line of questioning.

Mr. Neukom: On the third trip, you mean?

The Court: On the third trip?

Mr. Lavine: That is correct.

(Testimony of Grant B. Cooper.)

The Court: Well, Government's counsel has stipulated that.

Mr. Lavine: I haven't heard any stipulation.

The Court: Well, he just made a statement a moment ago that he agreed that she went over there of her own free will on the third trip.

Mr. Lavine: I will accept that stipulation, then.

The Court: And the testimony here this morning about the intervening, well, dispute between the second trip and the third trip and the witness' own statement that she went there. So counsel for the Government is now bound under his statement.

Mr. Lavine: Well, with that stipulation I deem that the purpose of this particular questioning is covered.

By the Witness:

I sent officers from my office to pick Miss Beverlin up and bring her to my office. I was informed by the officers that Mr. Di Marzo aided in pointing her out after she had returned. Miss Beverlin later came into my office, and I talked to her. [193]

As to whether I asked her then about her relations with Mr. Di Marzo—I don't recall whether any specific questions of that kind were asked of her by me or not. I don't believe she was ever at my house. She may have been. I do recall talking to her. I requested her to make a statement about her knowledge of any vice conditions that I was then investigating. I can't give you the exact time, but to the best of my knowledge and

(Testimony of Grant B. Cooper.)

belief it would be November 7, 1941. I know I did question any number of witnesses at my home and other places. But to the best of my recollection now we talked to her at the office. I may be wrong on that though; but that is the best of my recollection.

Cross Examination

By Mr. Neukom:

My office was only interested in connection with local or county vice. It wasn't within the jurisdiction of my office to prosecute anyone for violation of the Mann Act. Our office always cooperated with the F.B.I.'s office in trying to reveal facts which were violations of the Federal Laws. Mr. Di Marzo in the first instance was arrested by the Sheriff's office, not by our office. Our investigations had crossed those of the Sheriff's office. I believe from the knowledge I then had within my possession that Mr. Di Marzo had knowledge which would be of assistance to us in the objective of our investigation. In the course of my interviews with Mr. Di Marzo I confirmed the fact that he had considerable knowledge [194] concerning the vice and prostitution in this locality. To the best of my recollection he was charged with pandering, pimping and statutory rape. The complaint in the first instance was issued by our complaint department on application of the Sheriff's office, and it didn't come before me. I found in the course of my conversation with Mr. Di Marzo that he was abundantly acquainted with such sub-

(Testimony of Grant B. Cooper.)

jects and matters as that, with regard to this County. He was of great help to us because of that knowledge. I found that in order to be able to utilize his testimony in conjunction with convicting other persons that we must give him some sort of assurance that he would not be prosecuted, would not have to incriminate himself if he testified in these cases. It is my judgment, that is a usual thing which is done in all law enforcement agencies. That was entirely in the State Court, operating under the State Laws and not in any way under the Federal Laws. Mr. Di Marzo was known to me by two names that I recall: Joe Di Marzo and Joe Dundee.

Redirect Examination

By Mr. Lavine:

I cooperated with the Government during 1941.

Q. There wasn't anything in your case that wasn't open for investigation or prosecution during that year, was there?

Mr. Neukom: I object to that, your Honor. Obviously the Statute of Limitations does not run against the crime here. [195]

The Court: Objection sustained.

Mr. Lavine: Exception.

Q. (By Mr. Lavine): Well, in so far as this particular charge on trial here, there wasn't anything done by your office that prevented the Government from prosecuting the case in 1941, was there?

(Testimony of Grant B. Cooper.)

Mr. Neukom: I object. That is a conclusion.

The Court: Sustained.

Mr. Lavine: Exception.

Q. (By Mr. Lavine): Well, Mr. Cooper, without naming him, unless the Court so desires, did your investigation, and with the cooperation of Mr. Di Marzo, lead to someone who is now engaged in the handling of aliens for the sheriff's office?

Mr. Neukom: Just a moment. That is as vague as Alice in Wonderland. I don't know what in the world it has to do with this case. I object to it as being immaterial.

The Court: Sustained.

Q. (By Mr. Lavine): May I have an exception to the last ruling, your Honor?

The Court: You may.

By the Witness:

My investigation also led to police and deputy sheriffs who were under investigation. Mr. Di Marzo was very helpful in giving me information along that line. [196]

ANTHONY GEORGE JOSEPH JOYCE,

called as a witness by and on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am investigator attached to the District Attorney's office, Los Angeles County, California. During the years of 1940 and 1941 I was assigned to the investigation of public corruption and bribery. During the course of that investigation I met Joe Di Marzo, the defendant. I talked to him, and questioned him.

Q. Did he cooperate with you in the investigation?

Mr. Neukom: I object to this, your Honor, as being immaterial. Mr. Cooper is the head of the department. He said he cooperated. Any of this line of testimony is immaterial to this case. I object to it upon that ground.

The Court: Sustained.

Mr. Lavine: *Exemption.*

By the Witness:

I had occasion to question Judy Bradford, also known as Helen Merle Beverlin. I picked her up for questioning by my office. I believe it was either in the latter part of October or the early part of November of 1941. I, with the assistance of Mr. Ray Huber of the Los Angeles County Sheriff's Office, and by prearrangement with Mr. Di Marzo who walked [197] in a door with her to identify her

(Testimony of Anthony George Joseph Joyce.)
before us at the Rosslyn Hotel, in Los Angeles, we got acquainted with her and picked her up and brought her to our office. She was rather hysterical, and she said she had a hard trip on the boat. We obtained her promise to appear at an appointed time later in the week, I think, or the following week, and she kept the appointment. I got Mr. Di Marzo to help me point her out. I took Miss Beverlin in and later on I got a statement from her.

Cross Examination

By Mr. Neukom:

Mr. Di Marzo was cooperating with me along that line on my investigation of corruption and bribery. While he was cooperating with me along that line he singled out Judy Beverlin to me when she came into the hotel.

Redirect Examination

By Mr. Lavine:

The day he pointed her out—and I am going entirely my memory—it was the latter part of October, or the beginning of November, 1941. I believe the case that we wanted that girl Bradford in was tried beginning about the middle of November of last year, and I am using that for my guide.

Recross Examination

By Mr. Neukom:

As it turned out Judy Beverlin ran away and wouldn't testify as a witness. We couldn't find her for the trial [198] She never testified in that case. I was interested only in local matters.

(Testimony of Anthony George Joseph Joyce.)

As to whether I was interested in any Mann Act investigation—we asked questions or various witnesses on it, but we didn't obtain anything on it. I was not investigating anyone for a violation of the Mann Act.

* * * * *

Mr. Lavine: We have one other matter, your Honor, which perhaps counsel can stipulate to. We have a plea in here of once in jeopardy on the theory that the acquittal on the conspiracy charge acquits this defendant——

* * * * *

The Court: Well, do you want to move on that now? Are you through with your evidence?

Mr. Lavine: Except for Judy Bradford that we want to put on, yes, your Honor.

The Court: She won't be here until 1:00 o'clock tomorrow?

Mr. Neukom: We will make every effort to get her here [199] at 10:00 o'clock. If Mr. Lavine had told me that he wanted her, we would have had her back.

The Court: We can't go back to her.

Mr. Neukom: I don't know how to reach her.

Mr. Lavine: We will stipulate to that, your Honor.

The Court: She said she would stay in Bouquet Canyon with her mother.

Mr. Neukom: In Saugus. But I will immediately try to call there and get her here.

The Court: She also stated that she was staying

at the Rosslyn Hotel, according to my memory. Mr. Tyler might, in the meantime, see if he can find her so we won't have to be here until tomorrow, if it is not necessary. I don't want to inconvenience the Jury. Moreover, I don't know if I would put it over until tomorrow at 2:00 o'clock.

Well, she has got some bondsman. I know we used to do it. We just told the bondsman to get the witness.

Mr. Neukom: I told him that during the noon hour. I mean, just as soon as Mr. Lavine said he wanted her I told him to bring her.

The Court: All right. Will you try and find out, Mr. Tyler?

Mr. Tyler: Yes, your Honor.

The Court: So that we may have in the next few minutes some assurance as to whether she will or will not be here. [199-a]

* * * * *

Mr. Neukom: There was a plea of once in jeopardy made, your Honor.

The Court: In this case? [199-b]

Mr. Neukom: I had an impression that it was as a result of the other case, but it was probably raised as a bar to this case upon the grounds of the other case.

* * * * *

The Court: Did you find, Mr. Tyler, whether or not this witness can be here in the morning?

Mr. Tyler: Your Honor, I don't see any reason why she can't get here by tomorrow morning.

The Court: Very well.

Mr. Neukom: We have not located her yet.

Mr. Tyler: She has not been located. She has been seen but not found.

* * * * *

Mr. Lavine: At this time, if your Honor please, I move that the record be corrected nunc pro tunc to show that a plea of once in jeopardy was entered in Case No. 15,500.

The Court: Based upon the action theretofore had in 15,499? [200]

Mr. Lavine: That is correct.

The Court: And the action theretofore had was the acquittal of Helen Judy Bradford Beverlin?

Mr. Lavine: That is correct, who was charged jointly with the defendant.

The Clerk: The minutes will read:

“A plea of once in jeopardy, case 15,500, by virtue of the order entered?”

The Court: Not “by virtue of the order” but “by virtue of the acquittal of Helen Merle Beverlin in Case No. 15,499.”

Mr. Neukom: That’s right. [200-a]

Mr. Lavine: So stipulated.

The Court: All right. Then the order will be made to correct the minutes nunc pro tunc as of that date?

* * * * *

(Argument concerning jeopardy plea.)

* * * * *

Mr. Neukom: You will stipulate, will you not, that Mr. Di Marzo is the same Mr. Di Marzo in 15,499 as Mr. Di Marzo in 15,500, won’t you?

Mr. Lavine: Yes, I will stipulate to that.

Mr. Neukom: All right.

Mr. Lavine: It is a fact that we have to establish, and you stipulate to it, too, I take it?

Mr. Neukom: I certainly do. [201]

* * * * *

(Further argument concerning jeopardy plea.)

* * * * *

The Court: In this case, from the present state of the record it appears as though it has not been passed on. It was raised at the same time as the plea of not guilty.

* * * * *

I am, therefore, going to allow him and overrule your objection to the introduction of any evidence in connection with his plea of once in jeopardy and allow him to present evidence [202]

* * * * *

Mr. Lavine: May it please the Court, before I put on this evidence relating to once in jeopardy, may I call one of the investigators from the District Attorney's office back for just one further question?

The Court: I thought Judy Beverlin was coming back this morning.

Mr. Lavine: I think they haven't been able to locate her yet.

Mr. Neukom: I want to explain to your Honor what we did at the close of Judy Beverlin's testimony yesterday afternoon. There was no request at that time that she be here today. Let me explain what we endeavored to do about it. I excused her yesterday noon because no request had been made until 1:00 o'clock

today. Thereupon, yesterday afternoon, since Mr. Lavine requested she be back this morning, I called the bondsman and told him to have her here.

Having no way of knowing just where she was, Mr. Tyler called a location near her mother's, out in Saugus, and we were able to locate her mother at a telephone, and the mother told us to telephone at either Santa Monica or Venice; and Mr. Tyler also notified the mother in another's presence that if she heard from her to have her come in at 10:00 [203] o'clock this morning.

We again called the bondsman, Mr. Glasser, and told him to have her here at 10:00 o'clock this morning, and they have not been able to locate her.

The Court: Is the bondsman present in the courtroom?

Mr. Glasser?

(No response.)

Mr. Neukom: I saw him this morning, a little while ago, and I think he is doing everything in his power to locate her.

The Court: I just wanted to be sure Mr. *Glazier* understood the orders of the court that she be produced this afternoon at 2:00 o'clock. If anybody sees Mr. *Glazier*, I will interrupt the proceedings to further instruct him.

Mr. Neukom: Had we known she was wanted sooner, we would have brought her back.

Mr. Lavine: At the time she was here it was stated she was subject to call at any time, and there was no understanding she was going to be released.

The Court: She is not released.

Mr. Lavine: I appreciate that, your Honor; and we want her for further testimony. If your Honor will permit, we can proceed on this jeopardy question.

TONY JOYCE

recalled as a witness by and on behalf of the defendant, hav- [203-a] ing been previously duly sworn, was examined and testified as follows:

Redirect Examination

By Mr. Lavine:

So far as I am advised my investigation and the investigation of the District Attorney's office with relation to the matters that Mr. Di Marzo discussed with me is still open. [203-b]

* * * * *

Mr. Lavine: Shall I proceed on the jeopardy issue?

The Court: Proceed.

* * * * *

Mr. Lavine: At this time, I take it you will stipulate, Mr. Neukom, that in case 15,499-H Crim., U. S. A. vs. Joseph Di Marzo and Helen Merle Beverlin, also known as Judy Bradford, that the following indictment was returned:

Filed July 1, 1942, Violation United States Code, Title 18, Section 88, in the District Court of the United States of America, in and for the Southern District of California, Central Division.

“At a stated term of said Court began and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern

Division of California on the first Monday of February in the year of our Lord, One Thousand Nine Hundred and Forty-two.

“The Grand Jurors for the United States of America, impaneled and sworn in the Southern District of California and inquiring for the Southern District of California, upon their oath present : [204]

“That Joseph Di Marzo and Helen Merle Beverlin, also known as Judy Bradford, hereinafter called the defendants, whose full and true names are, and the full and true name each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: prior to the dates of commission of the overt acts hereinafter set forth, and continuously thereafter to and including March 30, 1941, did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other, and with divers other persons whose names are to the grand jurors unknown, to commit an offense against the United States of America and the laws thereof, the offense being to knowingly, wilfully, unlawfully and feloniously transport in interstate commerce from the Southern District of California, to Honolulu, Hawaii, a certain woman, to-wit: Helen Merle Beverlin, also known as Judy Bradford, with the intent on the part of them, the said defendants, and for the purpose of having said Helen Merle Beverlin, also known as Judy Bradford, practice prostitution and debauchery and for other immoral purposes; [205]

“And the grand jurors aforesaid, upon their oath aforesaid, do further charge and present that at the hereinafter stated times, in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purposes of said conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did commit the following overt acts at the hereinafter stated places:

“(1) On January 24, 1941, defendant Joseph Di Marzo, at Wilmington, California, placed Helen Merle Beverlin, also known as Judy Bradford, aboard the steamship ‘Lurline,’ bound for Honolulu, Hawaii;

“(2) On January 24, 1941, defendant Helen Merle Beverlin, also known as Judy Bradford, boarded the steamship ‘Lurline,’ bound for Honolulu, Hawaii;

“Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.”

That thereafter, Helen Merle Beverlin and Joseph DiMarzo were each arraigned on July 13, 1942, and the defendant was arraigned on that indictment, July 29, 1942.

Mr. Neukom: On July 29th, the defendant, Joseph DiMarzo was arraigned, and it was continued to 7-30-42 at 10:00 a.m. [206] for plea.

* * * * *

Mr. Lavine: That the case of Helen Merle Beverlin was continued to September 20, 1942, at 11:00 a.m.—Will you stipulate that the Helen Merle Beverlin referred to in this indictment is the same Helen

Merle Beverlin, also known as Judy Bradford, who testified in this court?

Mr. Neukom: I will so stipulate.

Mr. Lavine: I accept the stipulation. Who was the judge presiding?

Mr. Neukom: Judge Hollzer.

* * * * *

The Court: I presume you desire to stipulate, Mr. Lavine, as to the indictment you read, that if the clerk were sworn and testified, he would testify as to the indictment on file? [207]

Mr. Lavine: That is correct, that it was filed in the court of this district, and that the defendant, Helen Merle Beverlin in that case was arraigned in a court of this district, to-wit: The court of this district before Harry Hollzer.

The Court: Well, I suppose that stipulation goes to all other things, because, in my judgment, this court, which means the jury, can't take judicial notice of these proceedings in another case, even though it is another case in this district.

Mr. Neukom: I will stipulate such an indictment was filed and is pending.

Mr. Lavine: So stipulated.

The Court: As to all other matters which you propose to read, you wish to stipulate that the clerk, if called, would so testify?

Mr. Lavine: So stipulated.

Mr. Neukom: Well, I would like to hear it read.

The Court: Assuming they are correctly read.

Mr. Neukom: That is all I would want to reserve.

* * * * *

Mr. Lavine: "Minutes of July 13, 1942.

"The defendant and counsel for the Government waive a jury trial.

"It is ordered that the cause be, and it hereby is, continued to July 14, 1942, at 2:00 p. m., for setting.

"United States of America, plaintiff, vs. Joseph Di Marzo and Helen Merle Beverlin, alias Judith Bradford, defendants.

"This cause coming on for arraignment and plea of defendants Joseph Di Marzo and Helen Merle Beverlin, alias Judith Bradford, R. K. Lambeau and R. F. Duni, Assistant U. S. Attorneys, appearing as counsel for the Government; George Stahlman, Esq., appearing as counsel for defendant Di Marzo, Victor Bewley, Esq., appearing as counsel for defendant Beverlin; who is present on bond, and L. H. Winter, court reporter, being present and reporting the testimony and the proceedings:

"Defendant Beverlin states her true name is Helen Merle Beverlin.

"Attorney Bewley moves to substitute John S. Cooper, Esq., as counsel for defendant Beverlin, and it is so ordered.

"Attorney Stahlman requests that defendant Di Marzo be produced for arraignment and Attorney Lambeau states that the said defendant is in the custody of the Immigration authorities on a Presidential warrant, and is not [209] under the control of the U. S. Marshal.

"The Court rules that the matter is not now before the court and orders that this cause as to defendant Di Marzo be stricken from the calendar for arraignment and plea.

“Attorney Stahlman asks that he be notified when said defendant is brought before the court for arraignment, and Attorney Lambeau states that the Government will notify him.”

* * * * *

Mr. Lavine: But on Monday, July 20, 1942, the following minutes appear:

“United States of America, plaintiff, vs. Helen Merle Beverlin, defendant.

“This cause coming on for plea of defendant Helen Merle Beverlin, R. K. Lambeau, Assistant U. S. Attorney, appearing as counsel for the Government; John F. Cooper, Esq., appearing as counsel for the said defendant, who is present on bond; and F. L. Middleton, court reporter, being present and reporting the testimony and the proceedings: [210]

“The defendant waives reading of the indictment and pleads not guilty.

“Attorney Lambeau states that the Government waives jury trial.

“Linscott Tyler, agent of the Federal Bureau of Investigation, is sworn and testifies in behalf of the Government on examination by Attorney Lambeau.

“Both sides rest.

“The court finds the defendant not guilty, orders that defendant’s bond be, and it hereby is, exonerated, and that the defendant attend before the grand jury on July 22, 1942, at 9:30 a. m.”

Mr. Neukom: I will stipulate they are as you

have so read. And will you stipulate the defendant found not guilty there as only Helen Merle Beverlin?

Mr. Lavine: No, I will not stipulate the only defendant found not guilty is Helen Merle Beverlin, because that is a conclusion of law, and fact, which must be drawn in that case.

The Court: You are asking to stipulate that where the clerk wrote the word "defendant" in the minutes, the clerk meant Helen Merle Beverlin?

Mr. Lavine: I will stipulate to that, and that that is the same Helen Merle Beverlin who was here——

Mr. Neukom: Known as Judy Bradford.

Mr. Lavine: Known as Judy Bradford in this case, or Lani Nevins. [211]

On Wednesday, July 29, 1942, these further proceedings took place:

"United States of America, plaintiff, vs. Joseph Di Marzo, defendant."

No. 15,499—Crim.

"This cause coming on for arraignment and plea of defendant Joseph Di Marzo; R. E. Lazarus, Assistant U. S. Attorney, appearing as counsel for the Government; Geo Stahlman, Esq., appearing as counsel for the said defendant, who is present in custody; and C. W. McClain, court reporter, being present and reporting the testimony and the proceedings:

"The defendant states his true name is as set forth in the indictment, waives reading thereof, and Attorney Stahlman asks additional time for defendant to plead.

“It is ordered that the cause be, and it hereby is, continued to July 30, 1942, at 10:00 a.m., for plea.”

Mr. Neukom: May I ask if the defendant referred to there who asked for additional time is not Joe Di Marzo?

Mr. Lavine: The defendant is Joe Di Marzo.

Mr. Neukom: That it is Joe Di Marzo?

Mr. Lavine: We so stipulate, and Joe Di Marzo is the defendant who is in this case on trial at this time, under indictment 15,500.

Mr. Neukom: So stipulated.

Mr. Lavine: I have the minutes of the indictment 15,500, [212] so I will read them at this time.

The Court: What date?

Mr. Lavine: July 29, 1942.

“United States of America, plaintiff, vs. Joseph Di Marzo, defendant.

“This cause coming on for arraignment and plea of defendant Joseph Di Marzo; R. E. Lazarus, Assistant U. S. Attorney, appearing an counsel for the Government; Geo. Stahlman, Esq., appearing as counsel for the said defendant, who is present in custody; and C. W. McClain, court reporter, being present and reporting the testimony and the proceedings:

“The defendant states his true name is as set forth in the indictment, waives reading thereof, and pleads not guilty.

“It is ordered that the cause be, and it hereby is, continued to July 30, 1942, at 10:00 a. m., for setting.”

Mr. Neukom: That is the case we are now trying.

Mr. Lavine: So stipulated.

Now, on July 30, 1942, in the courtroom of Harry A. Hollzer, District Judge.

“United States of America, plaintiff, vs. Joseph Di Marzo, defendant.

“Case 15,499—Crim.”

That is the case involving the defendant and Helen Merle Beverlin, to which we have adverted—— [213]

Mr. Neukom: A conspiracy charge.

Mr. Lavine: “This cause coming on for plea of defendant Joseph Di Marzo, R. E. Lazarus, Assistant U. S. Attorney, appearing as counsel for the Government; Geo. Stahlman, Esq., appearing as counsel for the said defendant, who is present in custody; and R. T. Doidge, court reporter, being present and reporting the proceedings:

“The defendant makes a statement. Attorney Stahlman makes a statement in behalf of the defendant.

“It is ordered that the cause be, and it hereby is, continued to August 3, 1942, at 11:00 a. m. for plea.

“It is further ordered that Attorney Stahlman may withdraw as counsel for defendant Di Marzo.”

And case No. 15,500—Crim., which is the case on trial now:

“This cause coming on for setting for trial of defendant Joseph Di Marzo; R. E. Lazarus, Assistant U. S. Attorney, appearing as counsel for the Government; Geo. Stahlman, Esq., appearing as counsel for the said defendant, who is present in

custody; and R. T. Doidge, court reporter, being present and reporting the proceedings:

“Attorney Stahlman advises that *is* an early trial is insisted upon he will have to withdraw from the case. Attorney Lazarus states that the government is insist- [214] ing on an early trial. The court rules that there must be an early trial, and it is ordered that the cause be, and it hereby is, continued to August 3, 1942, at 11:00 a. m., in order to allow the defendant to employ other counsel. It is further ordered that Attorney Stahlman may withdraw as counsel for the defendant.”

You will stipulate those proceedings also involve the same defendant on trial in this court and in both cases?

Mr. Neukom: That is right.

Mr. Lavine: And that those were the minutes relating to both cases?

Mr. Neukom: That is right.

The Court: Up to that time?

Mr. Lavine: Up to that time.

* * * * *

Mr. Lavine: “Monday, August 3, 1942.

“United States of America, plaintiff, vs. Joseph Di Marzo, defendant.

“This cause coming on for plea of defendant Joseph Di Marzo; R. E. Lazarus, Assistant U. S. Attorney, appear- [215] ing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the said defendant, who is present in custody; and R. T. Doidge, court reporter, being present and reporting the proceedings:

“Attorney Lavine moves that the court determine that it has no jurisdiction and states the grounds for the said motion.

“The court orders that any motions be made in writing with the proper authorities and be filed by August 4, 1942, and that the cause be placed on the calendar of August 7, 1942, at 2:00 p. m., for hearing and for plea.”

Case No. 15,500-H. Crim.

Mr. Neukom: That is the case we are now trying.

Mr. Lavine: That is the case we are now trying.

“United States of America, plaintiff, vs. Joseph Di Marzo, defendant.

“This cause coming on for setting for trial of defendant Joseph Di Marzo; R. E. Lazarus, Assistant U. S. Attorney, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for the said defendant, who is present in custody; and R. T. Doidge, court reporter, being present and reporting the proceedings:

“Attorney Lavine moves that the court determine that it has no jurisdiction and states the grounds for the said motion. [216]

“The court orders that any motions be made in writing with supporting authorities and be filed by August 4, 1942, and that the cause be placed on the calendar August 7, 1942, at 2:00 p. m., for setting for trial.”

It is stipulated, is it, that refers to the same defendant here, and the same two cases in the District Court?

Mr. Neukom: Yes.

* * * * *

Mr. Lavine: "United States of America, versus Joseph Di Marzo." This is in the minutes of August 8, 1942, No. 15,499—Crim.

"This cause coming on for hearing (1) objections of defendant to jurisdiction of this Court and for plea:

"N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for defendant, Joseph Di Marzo, who is present in custody; and Mack Racklin, Court Reporter, being present and reporting the proceedings:

"Attorney Lavine makes opening statement in behalf of defendant's objections to jurisdiction of this Court, reviewing proceedings antedating the present matter. [217]

"Attorney Neukom makes a statement that the defendant is not a prisoner of war but is merely detained in a detention camp to answer the charge contained in the indictment.

"Attorney Lavine argues further, claiming the defendant is a prisoner of war, and cites authorities in support thereof, and that, therefore, this Court does not have jurisdiction in this case.

"Attorney Neukom states his office has written for authority to dismiss case No. 15,499—Crim."

* * * * *

Mr. Lavine:

"Attorney Lavine now argues in support of motion of the defendant for judgment of acquittal."

That is in case 15,499.

Mr. Neukom: The conspiracy case, the one we are now trying.

Mr. Lavine: The one we are trying, in so far as this issue is concerned, but we are not trying in so far as the indictment itself is concerned.

Mr. Neukom: That is right.

Mr. Lavine: So stipulated. [218]

“Attorney Neukom argues in opposition to said motion for a judgment of acquittal inasmuch as Case No. 15,499—Crim. will be dismissed on authority of the U. S. Attorney General.

“Objections and motions for judgment of acquittal are ordered overruled, to which counsel for the defendant notes an exception.

“And, the defendant being now called before the Court for entry of plea, and upon being asked to enter his plea, *pleas* not guilty in case No. 15,500—Crim., it is ordered that Case No. 15,499—Crim.—” there is a typographical error here.

The Court: Correct it now.

Mr. Neukom: It reads: “15,550”, doesn’t it?

Mr. Lavine: That is correct.

Mr. Neukom: It is obvious there was one extra “5” put in, instead of a “0”. That is the pleading to the instant case.

Mr. Lavine: That is the pleading to the case on trial, 15,500.

“——and it is ordered that Case No. 15,500 Crim. be, and it hereby is, set for trial before Judge Hall on September 9, 1942.

“Attorney Lavine also enters a plea of once in

jeopardy in behalf of the defendant in Case No. 15,499—Crim.,——” [219]

The Court: That was changed this morning. That was corrected. Will you read it as corrected. Mr. Clerk?

The Clerk: “On motion of Attorney Lavine it is ordered that an order be entered herein, nunc pro tunc, as of 8-8-42, Attorney Neukom stipulated thereto that a plea of once in jeopardy is entered in case No. 15500 PH, Crim., in behalf of defendant, Di Marzo, based upon the fact that by virtue of the acquittal of Helen Merle Beverlin in Case No. 15,499-H Crim. * * *”

The Court: All right.

Mr. Lavine:

“——and thereupon moves the Court for an order allowing counsel to interview the defendant without restrictions now in force in the detention camp where the defendant is confined; whereupon Attorney Neukom assured the Court and counsel that the camp will be specifically instructed to allow counsel for the defendant and the defendant to prepare for trial without the imposition of the usual restrictions of said camp, but that the defendant cannot be taken to the office of his attorney. Therefore, the Court makes no ruling thereon.”

The Court: Mr. Clerk, your minutes are correct on the plea of once in jeopardy in case 15,500? Have you got that there?

The Clerk: That is in the instant case, your Honor. [220]

The Court: These are combined minutes.

The Clerk: Yes.

The Court: So you had better indicate it is in case 15,500.

The Clerk: All right, your Honor.

The Court: By virtue of the acquittal of Helen Merle Beverlin in 15,499; both cases are instant in those minutes.

The Clerk: If the plea of once in jeopardy is entered herein, which is the case on trial.

The Court: A plea of once in jeopardy on behalf of defendant, in case 15,500.

The Clerk: All right, your Honor.

The Court: Instead of "case herein."

Mr. Lavine: May it be stipulated the minutes we have just read refer to the defendant on trial in this court and to Helen Merle Beverlin, who has been a witness in this court?

Mr. Neukom: So stipulated, with the further understanding, and I think the burden is upon you to establish this point: that the defendant Di Marzo has at no time pled guilty—I withdraw that—has at no time pled in any manner at all in the conspiracy case 15,499.

The Court: Do you accept that stipulation?

Mr. Lavine: No. I am not prepared to accept the stipulation as to not having pled. I am prepared to accept a stipulation that it is the same defendant, that he was [221] brought into court, and that there was a judgment entered as to Helen Merle Beverlin.

The Court: Is it your contention that he did *plea*?

Mr. Neukom: I think the burden is on you to establish that point.

Mr. Lavine: There is some confusion here, your Honor. The minutes seem to show on August 3 that Case 15,499 was continued to August 7, at 2:00 p. m. for hearing for plea. The minutes of August 7, should reveal as to whether——

The Court: Apparently it was continued to August 8, because those would be the first minutes transcribed again.

(Discussion)

* * * * *

Mr. Lavine: There was a hearing on motions, but it seems to me the clerk asked him how he pleaded on the questions on both indictments, and I am not certain as to whether he did or didn't. I think the point is not so material. In fact, I contend, regardless of whether he pled or didn't, he was once in jeopardy by reason of the acquittal of Helen Merle Beverlin.

The Court: I think all those things are material.

[222]

Mr. Neukom: If you don't want to stipulate I will put the clerk on in a few minutes.

The Court: The question is implicit as to whether or not a man is once in jeopardy, if he never has been tried, and he can't be tried unless he has pled.

Mr. Lavine: That would be a question of law, your Honor.

* * * * *

Mr. Lavine: I will enter into a stipulation subject

to a check with the court reporter and if there is any error we can correct it.

The Court: That Joe Di Marzo never entered any plea either of guilty or not guilty, or any other kind of a plea in case 15,499, other than as your motion for an acquittal might be considered a plea?

Mr. Lavine: No. He entered a plea of once in jeopardy. He entered a motion for judgment and acquittal, which is the same as a plea of once in jeopardy.

The Court: Then your stipulation is that he entered no plea of guilty or not guilty?

Mr. Neukom: That is right. [223]

Mr. Lavine: But he did enter a plea of——

The Court: Of once in jeopardy.

Mr. Neukom: That is correct.

Mr. Lavine: We so stipulate.

Mr. Neukom: And you further stipulate, or should I inquire from the clerk?—that Joe Di Marzo was never brought into court on case No. 15,499, either before a court or a jury impaneled, and tried on case 15,499?

Mr. Lavine: I can't stipulate to that, because that is the very issue. I will stipulate he was not personally present in court when this issue was tried. But my contention is, the trial of Helen Merle Beverlin and her acquittal of the charge of conspiracy would place this issue before a court and jury.

* * * * *

Mr. Lavine: ——or a judge sitting in lieu of a jury.

Mr. Neukom: I know your contention. Then you stipulate Joe Di Marzo in fact, was never himself present at any proceedings during the trial of case 15,499, the conspiracy case? [224]

Mr. Lavine: I will so stipulate, that he was not personally present.

Mr. Neukom: Very well.

Do you stipulate, Mr. Lavine, in a felony charge a defendant must be personally present?

Mr. Lavine: No. I won't stipulate to that, because under the doctrine that we are contending for, it wouldn't be necessary for anybody to be present if he was, in fact, legally acquitted.

Mr. Neukom: It is a matter of law.

Mr. Lavine: It is a matter of law for the court to determine.

LINSCOTT TYLER,

called as a witness by and on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am the Mr. Tyler referred to who testified in Judge Hollzer's court on this case. I am the investigating agent assigned to this case involving Helen Merle Beverlin and Joe Di Marzo. I am the investigator who appeared before Judge Hollzer in July of this year in relation to Helen Merle Beverlin. I was called as a witness in that case.

(Testimony of Linscott Tyler.)

Other than to give my name and address, I did not testify to any other fact in the case. After I gave my name and [225] address and testified merely as to that, the Government did not put on any other testimony to my knowledge.

Mr. Neukom: I will stipulate none was put on.

By the Witness:

In the transaction involved and which I investigated, I appeared as a witness before the Grand Jury. And I appeared as a witness in both case No. 15,499 and 15,500. I was called to testify regarding my investigation of a trip of Helen Merle Beverlin to Hawaii from Los Angeles, on July 24, 1941; before the Grand Jury in connection with the indictment, 15,499 and indictment 15,500.

Q. By Mr. Lavine: Your testimony in reference to the transaction involved in the identical transaction, did it not?

Mr. Neukom: Objected to on three grounds: one being, calling for a conclusion of the witness; one being, not material, no motion to quash the indictment; and whatever took place before the Grand Jury is secret, and this man is sworn.

The Court: Sustained.

Mr. Lavine: On which ground?

The Court: On all grounds; they are all good.

Mr. Lavine: We offer to prove by this witness that the transaction on which both indictments are founded is the identical transaction as to each indictment, and that it is the identical acts and alleged offenses, and that in his testimony before the Grand

(Testimony of Linscott Tyler.)

Jury, it resulted in the return [226] of both the indictments related to the identical acts, facts, and transactions.

Mr. Neukom: I object to the offer of proof.

The Court: State your grounds.

Mr. Neukom: Inasmuch as the offer is, in its scope, too broad, and too general for this witness even to attempt to comprehend what might be meant by it; that it is not a proper way to establish identity of transactions, because there is no showing to this Court this witness was the only witness before the Grand Jury, and on the further grounds that it would draw a conclusion from this witness if he was to have to testify along the lines as to the offer of proof.

The Court: The objection is sustained, and I think, also, the Court might point out that the testimony before a grand jury is only that degree of testimony which is sufficient to convince them of the probability of a commission of a crime.

Mr. Lavine: May I note an exception? My offer was not made for the purpose of showing what he went before the Grand Jury for, but for the purpose of showing that the identity of the offenses was the same. That is, each of these transactions on which the indictment was based was the identical transaction, and that it was founded on the single testimony, that is, it was founded on the testimony of this witness as to the identical transaction.

The Court: The objection is sustained. The jury will [227] be instructed to disregard the implica-

(Testimony of Linscott Tyler.)

tions as contained in counsel's statement of his offer of proof.

Q. By Mr. Lavine: Now, Mr. Tyler, your investigation of the transaction involving Helen Merle Beverlin and Judy Bradford was of the alleged act on January 24, 1941, relating to one single act on January 24, 1941. Isn't that right?

Mr. Neukom: The question is compound and vague.

The Court: Do you want to object on that ground?

Mr. Neukom: I object to that, yes.

The Court: Sustained.

Mr. Lavine: Exception.

I think, your Honor, I have not read into the record the indictment in this case.

Mr. Neukom: The clerk read it.

Mr. Lavine: May it be deemed——

Mr. Neukom: Reread,

Mr. Lavine: Deemed reread; in support of this plea.

Mr. Neukom: So stipulated.

The Court: Approved.

Q. By Mr. Lavine: Mr. Tyler, there was only one trip under investigation relating to January 24, 1941, involving this defendant and Helen Merle Beverlin. Is that correct?

Mr. Neukom: I object to the form of the question.

Mr. Lavine: So far as he knows.

Mr. Neukom: I further object as immaterial.

The Court: Sustained. [228]

Q. By Mr. Lavine: Mr. Tyler, you didn't tes-

(Testimony of Linscott Tyler.)

tify in 15,499 as to any trip made by anyone, did you?

Mr. Neukom: I object to the question because there is no place fixed, nor a date?

Q. By Mr. Lavine: On July 13, 1941, in the District Court of the United States. You didn't testify as to anyone having made any trips, did you?

A. In what Court?

Q. In Judge Hollzer's Court when you appeared as a witness.

Mr. Neukom: I object to the question on the ground it has already been asked and answered. Is this the date, or the date of July 20?

The Court: He means the date of trial.

Mr. Lavine: The date of trial, whichever it was.

The Court: When Helen Merle Beverlin, or Judy Bradford, was held.

Mr. Neukom: July 20.

The Court: Objection sustained on the ground it has been asked and answered, whatever it was; July 13 or 20. [229]

* * * * *

Mr. Lavine: Will we have Helen Beverlin at 2:00 o'clock?

Mr. Neukom: I think Mr. Glasser will do everything he can to try to find her. I think she will be in around 1:00 o'clock.

The Court: What is the name of the bonding company? Give me the file.

Mr. Neukom: This woman, whenever we told

her to come in at such and such an hour, appeared at that hour, excepting yesterday when she had some trouble about her car service.

(Discussion.)

(The following remarks were without the hearing of the jury.)

(Discussion concerning Helen Merle Beverlin.)

* * * * *

The Court: What do you propose to prove? That is the point.

Mr. Lavine: I propose to prove that she is acting not in behalf of the defendant, but acting on advice of counsel.

The Court: That is a conclusion.

Mr. Lavine: Well, I expect to prove that she was advised by her attorney not to make any statements, and that she [230] made no statements until after this conspiracy case was dismissed against her.

The Court: The point is: you want to prove she didn't make statements until then, or she was advised by her attorney not to make any until then?

Mr. Lavine: Advised by her attorney.

The Court: That is immaterial.

Mr. Lavine: And she didn't make any until then.

The Court: I imagine to that portion the United States Attorney will stipulate.

Mr. Neukom: I will stipulate.

Mr. Lavine: Then I expect to ask her a number of questions relating to the quarrel that Mrs. Morgan testified to yesterday; that they apparently had quite a quarrel.

The Court: Another quarrel?

Mr. Lavine: Yes, before she went to the Islands, and that in relation to that quarrel she said she wanted to get away from Joe, and that she had made up her mind to leave and that she was going to go away; and that there had been quite a quarrel about that subject. I want to go further into that.

The Court: That is all?

Mr. Lavine: No. I want to ask her further about whether—I want to go into a little more detail with her on the point of whether Mr. Di Marzo had any part in sending her to the Islands. There was one witness who testified that he did [231] send her.

* * * * *

The Court: You try to have Miss Beverlin here at 2:00 o'clock.

Mr. Neukom: If I can.

The Court: And I will conclude at that time, if she is not here, whether or not we shall proceed.

(The following was within the hearing of the jury:)

The Court: Has the defendant rested?

Mr. Lavine: Oh, no, your Honor. We have Helen Merle Beverlin to call.

Mr. Neukom: The elusive Miss Bradford. Miss Davidson, would you come over here?

Miss Davidson, your Honor, is the receptionist in our office. She advised me that about 1:00 o'clock, I believe it was, Judy Bradford called it and said that she would be in at 1:30, and then at 1:30, or

thereabouts, Judy Bradford called and stated that she was at a doctor's office but would be here within shortly after 2:00 o'clock. Is that correct?

Miss Davidson: That is correct. [232]

The Court: What doctor's office?

Miss Davidson: She didn't state, your Honor.

The Court: Didn't you ask?

Miss Davidson: I did, but she didn't seem to care to answer me.

The Court: What is that?

Miss Davidson: She didn't seem to care to answer me.

The Court: You did ask her?

Miss Davidson: Yes.

Mr. Neykom: Did you tell her to come here immediately?

Miss Davidson: I told her it was most important to be here because I knew Mr. Neukom was anxious to see her.

Mr. Neukom: I think, your Honor, she will be here in a few moments. That is all we can do about it.

The Court: Well, I want to finish with that matter, as well as the arguments, this afternoon.

* * * * *

The Court: Well, I don't think there remains sufficient time this afternoon for arguments. I dislike to cut the defendant off of any opportunity to present his cause. [233]

Mr. Neukom: Can we wait ten minutes, your Honor?

The Court: Well, I am surprised you couldn't

have found out what doctor's office she was in so that we could have talked to the doctor. I suppose that was a medical doctor?

Mr. Neukom: Well, I assume so. I don't know.

The Court: It is safe to assume it wasn't a doctor of divinity.

Mr. Neukom: I will stipulate to that, unless she is something like the Mary of biblical times.

I think, your Honor, that we have tried every way we can to produce her. I have left instructions to hustle her here as quickly as possible.

Mr. Lavine: What? Hustle?

The Court: It will just take ten minutes. I will probably take another recess until 2:30. If she isn't here by that time, I think that fair and reasonable opportunity will have been extended to the defendant so that his rights will have been respected and protected in connection with his desire to further cross examine Judy Beverlin. I should like to urge the United States Attorney to see if he can find out something about——

Mr. Neukom: Her bondsman is here. I believe he has cooperated in every extent possible.

No, he just left a few moments ago. I guess he went up to our office to see if she was up there. He was here when I made my statement. [234]

(Jury Present)

Mr. Neukom: Your Honor, I have no further word, no new developments.

Mr. Lavine: At this time the defendant moves for a continuance to permit the presence of Judy Beverlin for further cross examination.

Mr. Neukom: I oppose upon the ground, your Honor, that counsel did not specify when he wanted her back, and we have done everything in our power to produce her.

The Court: The motion is denied.

Mr. Lavine: Exception noted. Now, at this time the defendant offers to prove by the witness Judy Beverlin, if called, certain matters which I would like to specify, if Mr. Neukom has no objection.

Mr. Neukom: I have no objections to your making your offer of proof before the jury and the court.

Mr. Lavine: The defendant offers to prove through Judy Beverlin that she was never sent to Hawaii by the defendant, and that she would so testify on further cross examination.

The defendant offers to prove also that she was acting under the advice of counsel at the time she was first apprehended; that her counsel was Mr. John S. Cooper and that she declined to testify upon advice of her counsel and not out of any consideration of Mr. Di Marzo, and

That she further did not make any statements until subsequently and after the action had taken place in this court [235] in which she was acquitted, and that was on advice of her counsel, and that the bond was reduced in her case from \$2,000 to \$1,500. I offer to prove also that she had a quarrel with Mr. Di Marzo shortly before she left for Hawaii over Joan Day and that Mrs. Morgan came into the apartment to see her;

That the quarrel related to her wanting to go to Hawaii and the defendant told her he did not want her to go.

That is the substance of my offer of proof at this time.

Mr. Neukom: Your Honor, I oppose the offer of proof upon the ground that counsel had adequate time to have brought out any of those facts. In fact, I think they have all been delved into in some way or other while Judy Bradford was on the stand and they are not now unique. And I further urge that of course it is obvious that counsel's offer of proof is merely an offer of proof not to be considered as any evidence in the case.

The Court: The motion to continue is denied, and the objection of the United States Attorney, on the grounds stated, is sustained. The jury is instructed to disregard the implications contained or which might be inherent in the statement of counsel in his offer of proof.

Mr. Lavine: Exception noted to the matter as ruled on.

The Court: Very well.

Mr. Lavine: Now, there is one other matter that I should like to make an offer of proof on, and that is in [236] connection with the jeopardy matter:

That Judy Beverlin would testify—perhaps the United States Attorney may stipulate to this—that she is the Judy Beverlin who was on the Lurline on January 24th, and that she is the same party on that trip referred to in both indictments.

Mr. Neukom: I will so stipulate.

Mr. Lavine: I will accept that stipulation.

* * * * *

Mr. Lavine: We have some motions to make before we actually rest.

The Court: You rest except for your motions?

Mr. Lavine: That is correct.

(The following remarks were made at the bench outside of the hearing of the jury:)

Mr. Lavine: At this time the defendant moves to strike from the testimony all the testimony of Miss Anderson, starting at Page 96, relating to other offenses and other persons not contained in this indictment, and asks that the court instruct the jury to disregard them.

The Court: That was Page 96 and 97?

Mr. Lavine: That's right, Page 96 and 97. [237]

The Court: That motion is denied.

Mr. Lavine: Exception noted. At Page 100 to Page 101, Line 7, Page 101, first——

* * * * *

Mr. Lavine: One question that you sustained the objection to. But on Page 100, all of Page 100, you permitted all of that.

The Court: Motion denied.

Mr. Lavine: Exception. Now, Line 7, Page 101, to Line 26—perhaps to keep my record clear, should we say that we are referring to those pages in the reporter's transcript, starting with my question by Mr. Crawford.

The Court: That motion is denied likewise.

Mr. Lavine: Exception. Page 103, Line 4, to

Page 104, Line 3. I might state my ground for the motion. I think your Honor understood that I am objecting to this testimony, and may it be so understood that as to all the previous motions that I have made on the ground that it is other alleged acts, facts, and transactions?

The Court: Than the transportation?

Mr. Lavine: Than the transportation.

The Court: And it is immaterial, incompetent, irrelevant?

Mr. Lavine: Yes, and prejudicial to this defendant by [238] reason of alleged offenses not within the issues here.

The Court: Yes, I understand that.

Mr. Lavine: And you understood as to all the other objections I made?

The Court: Yes. Denied.

Mr. Lavine: Exception. Now, Page 104, Line 23, with reference to Joan Day——

Mr. Neukom: Judy Bradford has arrived, your Honor.

(The following was within the hearing of the jury:)

The Court: Do you move to reopen your case?

Mr. Lavine: Yes, I move at this time to reopen the case for the purpose of putting Judy Bradford on the stand.

The Court: Very well.

Mr. Neukom: No objection.

HELEN MERLE BEVERLIN

called as a witness be and in behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

On my former examination I testified that I knew Joan Day. I remember an occasion of meeting Joan Day one night in Miss Anderson's apartment when Mr. Di Marzo was there. I don't remember exactly quarreling with Mr. Di Marzo. I didn't have an argument with him over Joan Day that I can [239] remember. I was doing a little drinking. I don't recall. I didn't subsequently quarrel with him over the fact that he was with Joan Day that night, that I can particularly remember. I was drinking. I don't remember much of anything that went on that night. I don't remember quarreling with him. I don't remember going into another room and crying with Miss Anderson. I don't remember it. I don't remember whether I told Mr. Di Marzo that night that I wanted to go away or not. Perhaps I might have told him later on that I wanted to go away, but I don't remember telling him that night.

Q. Well, isn't it a fact that you went to Hawaii because you wanted to get away from Mr. Di Marzo?

Mr. Neukom: I object to that, your Honor, upon the ground it has been asked and answered.

The Court: Objection sustained.

(Testimony of Helen Merle Beverlin.)

Q. By Mr. Lavine: Well, Mr. Di Marzo didn't ever send you to Hawaii, did he?

Mr. Neukom: I object to that as calling for the conclusion of the witness.

The Court: Sustained.

Q. By Mr. Lavine: Mr. Di Marzo didn't ever persuade you to go to Hawaii, did he?

Mr. Neukom: I object to that as calling for a conclusion, asked and answered.

The Court: Sustained. [240]

Mr. Lavine: May I have exceptions to the last two rulings?

The Court: You may have an exception.

Q. By Mr. Lavine: Didn't Mr. Di Marzo ever urge you to go to Hawaii?

Mr. Neukom: Same objection.

The Court: Same ruling, same exception.

By the Witness:

I don't know whether I had occasion to talk to my attorney Mr. John S. Cooper after I was indicted in Case No. 15,499. I don't know anything about numbers. I know the case in which I was indicted and brought into this court.

Q. When you were brought into this court on this case do you remember what your bond was fixed at originally?

Mr. Neukom: I object to that as being immaterial to the case.

Mr. Lavine: Well, I want to show that the bond was lowered after she made her statement, your Honor.

(Testimony of Helen Merle Beverlin.)

Mr. Neukom: I will stipulate that it was.

Mr. Lavine: I will accept the stipulation.

The Court: Proceed.

Q. By Mr. Lavine: Well, Miss Bradford, when you were on your second trip to Hawaii you didn't ever send any letters to your mother, did you?

Mr. Neukom: I object to that as being immaterial to this case, your Honor. [241]

The Court: Sustained.

Q. By Mr. Lavine: You didn't send any letters to anyone during your second trip to Hawaii, did you?

A. I don't remember whether I did or not.

Q. Just before you left for your second trip to Hawaii didn't you have an argument with Mr. Di Marzo in which he stated he did not want you to go to Hawaii?

Mr. Neukom: I object to that as having been asked and answered.

The Court: Sustained.

Mr. Lavine: Exception.

Q. By Mr. Lavine: As a matter of fact, didn't you have quite a quarrel over the matter?

Mr. Neukom: Objected to as being repetitious.

The Court: Sustained.

Mr. Lavine: Exception.

By the Witness:

I can't recall seeing Mrs. Morgan a few days before I went away. I can't remember her coming to my apartment and asking me if I would telephone

(Testimony of Helen Merle Beverlin.)

Mr. Di Marzo, that he was worried because he didn't know my whereabouts.

Q. Do you remember having a conversation with her in which she stated to you that Mr. Di Marzo had said that you and he had quarreled and that he hadn't seen you and she asked you to telephone him?

Mr. Neukom: I object to this as not proper subject matter [242] of impeachment; furthermore, upon the ground that this is, as I understand it, in the nature of affirmative evidence on behalf of the plea in jeopardy. It is not a proper question under that motion, and there was no foundation laid at any time for this testimony, nor did Mrs. Morgan testify in that fashion.

The Court: Well, some of your objections are good, sufficient to sustain the objection.

Mr. Lavine: This testimony is not, I understand, however, being *putting* on in support of defendant's plea in jeopardy?

Mr. Neukom: Oh, well, then, I am mistaken. I had that impression, your Honor.

Mr. Lavine: I stipulated to the fact that I wanted it brought out on the plea of jeopardy, Mr. Neukom.

Mr. Neukom: All right, go ahead.

By the Witness:

I only took one trip on the Lurline starting in January of 1941.

(Testimony of Helen Merle Beverlin.)

Cross Examination

By Mr. Neukom:

I was not late to court because of your statements or any F. B. I. statement to me to be late. I have been ill. I am under the care of a doctor now, and that is the reason why I was late. [243]

* * * * *

Mr. Lavine: I don't want to prolong that point unnecessarily, but I don't want any erroneous implications to arise.

Mr. Neukom: I will stipulate that she was not late because of any action upon your part or anybody that might be in any wise affiliated.

Mr. Lavine: We wanted her here.

Mr. Neukom: We both wanted her here.

Mr. Lavine: I will accept the stipulation.

The Court: Where is the bondsman? Mr. Grazier, are you the bondsman?

Mr. Grazier: Yes.

The Court: All right. You may be excused, and there will be an order made exonerating the bond. You are excused.

* * * * *

The Court: Do you rest now?

Mr. Lavine: With the exceptions of the motions that we were making at the bench. [244]

* * * * *

Mr. Neukom: The Government rests, your Honor.

* * * * *

The Court: You may resume your motions.

* * * * *

(Thereupon the jury was excused.)

Mr. Lavine: Now, Page 104, Line 4, to Line 11: I move to strike it on the grounds——

The Court: Denied.

Mr. Lavine: Exception. May it be understood that all these motions, unless otherwise indicated, are made on the grounds indicated?

The Court: It may be so understood, yes.

Mr. Lavine: And Page 104, Line 23, to Page 105, Line 1.

The Court: Granted.

Mr. Lavine: Page 105, Line 11, to Line 19.

The Court: Motion denied.

Mr. Lavine: Exception. Page 108, Line 22, to Page 109, Line 2.

The Court: Denied.

Mr. Lavine: Exception. Page 109, Line 24, to Line 26, same page. [245]

The Court: Well, I struck something here on Page 109, and that portion of her testimony may be stricken from the record. I don't know what I was referring to. Oh, she started to say "she had told me that he had taken traveler's . . . " that portion was stricken then and is stricken from the record. That is at the top of Page 109, Line 1. That portion of her testimony, that is a conversation that Judy had with the witness. Then the pending motion from Line 4 to Line 24, is denied.

Mr. Lavine: Page 176, Line 11 to Line 16. I think there was a motion to strike and it was denied, your Honor. So that is covered by a previous ruling.

Mr. Lavine: Page 176, Line 11 to Line 16. I made a motion to strike, which was denied, and apparently there is not a notation of the exception. May I have an exception to the motion to strike?

The Court: The motion to strike was denied, and it is denied again and exception noted.

Mr. Lavine: Also the subsequent testimony of Joan Day, Page 176, Line——

The Court: Your motion to strike that last answer of Joan Day on Page 176?

Mr. Lavine: Yes, your Honor. I am now making a motion [246] to strike the testimony of Joan Day.

The Court: Well, the one before, Lines 14 to 16 “Q. What did Joe say, if anything, when he introduced you to Marion Anderson during the course of that conversation?”

Mr. Lavine: That was my previous motion

The Court: Yes. And that just went to that. Or did it go on over?

Mr. Lavine: Well, now, I am making another motion, from Line 25 on the same page to Page 177, Line 4.

The Court: On what basis? On the basis that they are contradictory? She said she had never done that before, and then she said she was a prostitute?

Mr. Lavine: No, not on that basis, your Honor.

The Court: The motion is denied.

Mr. Lavine: Exception. There are two motions. One of them is Page 176, beginning with Line 11 and down to Line 24. That is, the next motion is

for the immediately following testimony which begins at Line 25, Page 176, and continues to and including Line 4, Page 177.

The Court: They are all denied and exceptions noted.

Mr. Lavine: I made an objection there on Page 177, and then your Honor made the observation that the ruling at that time was without prejudice to renewal of the motion to strike, which motion is now made at this time.

The Court: And which is denied.

Mr. Lavine: Exception noted. On Page 177, the reference [247] to the conversation:

“A. Well, he says that she and another girl was leaving and that it was very expensive . . . ”

I move to strike out the reference “and another girl.” It is not within the issues of this case.

The Court: Motion denied.

Mr. Lavine: Exception.

On Page 210, the testimony of David Goodsell, Line 18, to Page 211, Line 1: I move to strike that.

The Court: Denied.

Mr. Lavine: Exception.

And Line 9 to Line 16, same page.

The Court: Denied.

Mr. Lavine: Page 212, Line 7 to Line 15.

The Court: Denied.

Mr. Lavine: Exception, Page 229, the testimony of Helen Merle Beverlin, Line 7 to Line 23: I move to strike that.

The Court: Denied.

Mr. Lavine: It being understood, of course, my previous objections apply to that?

The Court: Yes. Same ruling.

Mr. Lavine: Page 233, Line 7—that should go to Page 232, Line 21, to Page 233, Line 16. I guess that will go clear over, your Honor, to Page 234, Line 6, all of it.

I move to strike that on the previous grounds stated. [248]

The Court: Everything is material and competent except the remarks of the court. I will have to deny your motion.

Mr. Lavine: We are not quarreling with the remarks of the court, only those of Judy Bradford or Helen Merle Beverlin.

Page 238, Line 1 to Line 16.

The Court: Denied.

Mr. Lavine: Exception. Page 238, Line 23, to Page 239, Line 2—it should go down to Line 11.

The Court: Denied.

Mr. Lavine: Page 269, Line 25—the question goes back to Page 266, Line 24, to Page 267, Line 3, and then there was some argument and it is resumed on Page 268 and Page 269.

The Court: What do you want me to strike? Beginning line what on Page 266?

Mr. Lavine: From Line 24 to Line 3, 267; and then from Line 2, Page 269, down to Line 10, Page 269.

The Court: Granted.

Mr. Lavine: Line 11 to Line 12, Line 18 and 19 of that same page 269.

The Court: The motion is granted.

Mr. Lavine: Page 270, Line 26, to 271, Line 10.

The Court: The motion is granted.

Mr. Lavine: Page 272, Line 3 to Line 16.

The Court: Granted.

Mr. Lavine: All the testimony, Page 273, from Line 1 to 277—[249]

The Court: Everything on 273? 273 is granted.

Mr. Lavine: Wait a minute. All of 273.

The Court: The motion is granted down to—Line 20 of Page 276.

Mr. Lavine: Well, your Honor, how about that Line 5 on Page 276, “Q. Were you present when Dolly purchased the ticket”?

The Court: That may be stricken on the ground it is immaterial, Lines 25 and 26.

“Q. Did he give you any money at that time?

“A. Yes.

“Q. Did he give you some money to purchase your ticket? A. Yes.”

That remains in.

Mr. Lavine: Exception. Page 279, Line 2, testimony of Joan Day, redirect resumed, Lines 2 to 14.

The Court: Your motion is denied.

Mr. Lavine. Exception.

The Court: I suppose you are making the motion to go on over to Page 281, Line 20?

Mr. Lavine: Yes, your Honor.

The Court: The motion is denied.

Mr. Lavine: Exception. If your Honor is going to leave that testimony in from Joan Day, I would respectfully withdraw my motion to strike the testi-

mony on Page 273 because [250] it leaves us without an opportunity to rebut. I withdraw my motion to strike 273 to——

The Court: What line on Page 273?

Mr. Lavine: Line 1, Page 273.

The Court: If you wish to withdraw your motion, why, the matter will be restored to the record. Page 273, Line 1, to 276, Line 19?

Mr. Lavine: That's right. Now, Page 284, Line 14—to Line 25, Page 284.

The Court: Denied.

Mr. Lavine: Exception. Page 285, Line 10 to Line 15.

The Court: Denied.

Mr. Lavine: Page 287, Line 12 to Line 25, Page 287, Helen Merle Beverlin.

The Court: Denied.

Mr. Lavine: Exception. Page 288, Line 7, to—13.

The Court: Denied.

Mr. Lavine: Exception. Did I say "287"? It should be 288.

The Court: Yes, 288 down to Line 25.

Mr. Lavine: Down to Line 25 is correct.

The Court: Denied.

Mr. Lavine: Exception. Page 288, Line 25 to Page 289, Line 4.

The Court: Denied.

Mr. Lavine: Exception. Page 289, Line 5, to Page 291, [251] Line 11.

The Court: Denied.

Mr. Lavine: Exception. Page 292, Line 16, to Page 296, Line 6, all relating to the first trip, your

Honor, which she took, irrelevant, incompetent, immaterial, not within the issues of this case.

Mr. Neukom: It was offered for the limited purpose of intent, your Honor.

Mr. Lavine: Nor corpus delicti established to that particular transaction. Therefore, it is not a similar transaction.

The Court: Denied.

Mr. Lavine: Exception.

* * * * *

Mr. Lavine: Now, at this time the defendant again renews his motion for a directed verdict, both on the plea of not guilty and on the plea of once in jeopardy. Your Honor has heard all the evidence in this case. I think that it will not take long to present the matter on both of the motions.

The first motion, your Honor, on the question of a directed verdict, with all the evidence in, was presented to your Honor at the close of the Government's case, and, as pointed out at that time to your Honor, I felt that the [252] evidence was insufficient under the indictment as charged because the indictment in this case charges transportation and causing transportation in interstate commerce for the purpose of prostitution.

Now, certainly very little attention needs to be given to the first portion of that indictment because this defendant did not transport Helen Merle Berlin. He didn't carry her anywhere.

The Court: I don't think the Act contemplates that he should be like the old man on the mountain and carry these girls around piggy back.

Mr. Lavine: No, your Honor. But the cases that relate transportation, cases where a man has taken some girl across the state line in an automobile or by train for immoral purposes, or has gone on a boat trip—I don't remember of any boat trips particularly that I have read—of course, that was in the contemplation of the statute, and I suppose in this day and age an airplane could very well be means of transportation; but there has to be some transportation. Here there was none.

The Court: Here your theory was that he must accompany them?

Mr. Lavine: Yes, or transport them by his means or accompany them, yes; either take them in an automobile which he is driving or accompany them by plane or otherwise. That would be transporting them.

[253]

Now, the other avenue which the statute provides is one that perhaps your Honor has in mind, and it considers his causing them to be transported. Now, did this defendant cause this girl to be transported in interstate commerce under the Act? What did he do that was the causation as defined under the Mann Act cases? Where did he actually, according to her testimony which the Government has produced in this case, cause her to be transported? She went there because she wanted to go.

Now if, as we had the situation here this afternoon, your Honor wanted her to be produced in court and had caused her to be brought in by some compulsion or force or some avenue of causation, that, of course, would be causing her to be transported. But here

there is no evidence, even if we assume that the defendant gave her money to take the trip. The mere fact that he let her have money to take the trip, to go to Hawaii, wouldn't of itself be a causation for the transportation.

I submit, without making too extensive an argument on that point, that issue on the insufficiency of the evidence and urge a directed verdict at this time on that point.

The Court: Motion denied.

Mr. Lavine: Exception. Now, on the question of once in jeopardy my position is very simple.

The Court: Have you changed your position from this morning? [254]

Mr. Lavine: Not at all. It is the same matter that I presented to your Honor.

The Court: This morning you were insisting that it go to the jury. Are you now asking me, as the judge, to pass upon your plea of once in jeopardy?

Mr. Lavine: Oh no, your Honor, I am not. I am asking your Honor to direct the jury to return a verdict for the defendant on the plea of once in jeopardy.

The Court: I see.

Mr. Lavine: This is a motion for a directed verdict.

The Court: All right.

Mr. Lavine: Perhaps I didn't make that clear.

The Court: I understand now. I just wanted to have it clear for the purposes of the record because in the Peters case it seems to make a distinction.

Mr. Lavine: My position is that your Honor should direct the verdict for the defendant on the

plea of once in jeopardy. My ground for that is that under the first indictment, Indictment 15,499, the defendant was technically acquitted by reason of the acquittal of his co-defendant, Helen Merle Beverin. Now, it is true that the Government contends that the indictment specifies the defendant and Helen Merle Beverlin and other persons to the grand jurors unknown. But when the Government puts on its case it did not produce any testimony that there were any other persons to the grand jurors unknown, and certainly they can only be bound by the testimony [255] and we can only be governed by the testimony and we can only be governed by the testimony that is produced in this case, which we have produced here for your Honor. Therefore, we have a situation where there are only two persons who are charged, and the evidence does not show that any more than two persons were involved in the transaction, neither in that case nor in this case is there any evidence that there was any other person other than Helen Merle Beverlin and the defendant Di Marzo.

Therefore, an acquittal by the court of Helen Merle Beverlin operated as an acquittal, as a matter of law, of the defendant Di Marzo. Since he was acquitted on that charge, and the charge being the same transaction, not the identical charge because that was conspiracy there, it was the identical transaction and certainly there could not be the substantive offense without a conspiracy to commit the substantive offense. If there could be no substantive offense without the conspiracy, an acquittal of part of the charge would acquit the defendant of all of the charge. Therefore,

I urge your Honor to direct the verdict for the defendant in this case on the plea of once in jeopardy.

The Court: Motion denied.

Mr. Lavine: Exception.

Mr. Neukom: May I make one motion? Your Honor, I urge in view of the argument of counsel—it apparently is the position that he has now adopted that the previous indictment, [256] 15,499, shows that only two people were involved in the conspiracy—that under the law of the Gebardi case, 287 U. S. 112, the victim and another person cannot be guilty of a crime of conspiracy.

I further urge that if he goes away from that position that under the law——

The Court: What position?

Mr. Neukom: The position that two people were charged with the crime, and only two people, the conspiracy charge.

The Court: Very well.

Mr. Neukom: That if he follows that position, obviously neither one of the parties, or both, could have been found guilty under the Gebardi case, and that the conspiracy indictment, even though it exists, was a nullity.

The Court: I have denied his motion.

Mr. Neukom: But I want to further pursue that.

The Court: You mean you want to educate the court a little bit?

Mr. Neukom: Maybe I want to hear my voice, your Honor. But I assure you that I don't.

My position is simply this: That the burden of proof was upon the defense to establish by a prepon-

derance of the evidence that this defendant was once in jeopardy, having not established, and, as a matter of law, in view of the record and the stipulations that have been entered into, the record as read here, that there is nothing to go before the jury, [257] only a question of law so far as double jeopardy is concerned.

The Court: What is your motion?

Mr. Neukom: The motion of the defense to have submitted to the jury the determination of the plea in jeopardy should not be had.

The Court: What, in effect, you are doing is moving to strike all of the testimony relating to the plea in jeopardy.

Mr. Neukom: That's right.

The Court: And the ground again?

Mr. Neukom: The ground is, as I have endeavored to urge, that the burden was upon the defendant to establish that the offenses were identical, which has not been established. And the law is, and the facts are that they were separate and distinct offenses, conspiracy and the substantive offense.

The Court: That can all be covered in instructions.

Mr. Neukom: Well, I am merely urging that I feel the matter is confusing to this jury in view of the fact the record shows that the defendant was never tried upon the previous case.

The Court: He has a right to submit his evidence on my previous ruling, no matter how slight it might be. That is a question of the weight of the evidence.

Mr. Neukom: Very well.

The Court: That is for the jury to determine. As a matter of law, where I called upon him, it had to be passed on. And I think that under the decisions here, not having [258] been previously passed on by the court and now being insisted on and pressed by the defendant as a right to be passed on by the jury, he has that right.

Mr. Neukom: Very well.

The Court: Your motion to strike is denied. Does everybody rest again now?

Mr. Neukom: We are ready to argue the case, your Honor.

* * * * *

(Jury Present)

Mr. Lavine: May I make this one observance, your Honor? There was a point raised early in the proceedings of this case, and in order to complete my record as to that one matter I would like the record to show that the defendant has been in court at all times in the custody of the Immigration Officer, and at times two Immigration Officers.

The Court: The record will show that the defendant has been present at all times in court with counsel and that there has been an Immigration Officer and sometimes two in attendance at all times.

Mr. Lavine: And in the presence of the jury.

The Court: In the presence of the jury.

Mr. Lavine: Further there was some reference made this morning, and I noticed in reading the minutes, and I think counsel will stipulate, that the defendant is an internee; [259] he is interned for the duration of the war.

Mr. Neukom: I object to that, your Honor. It hasn't a thing to do with this case, whether he is interned or not interned.

The Court: I think it is immaterial.

Mr. Lavine: There was reference in the minutes, and I wanted to clear up a statement that was read of Mr. Neukom's in the minutes that this was the sole purpose, so as to complete my record on previous objections that were made.

Mr. Neukom: I didn't read it. You read it.

The Court: Well, I think it is immaterial.

Mr. Lavine: Well, it is a fact going to the objections which I have heretofore made, your Honor.

Mr. Neukom: I am going to point out on that matter, your Honor: counsel makes some stress of that. A party can be interned and can be paroled the next day by the Attorney General.

Mr. Lavine: There is no evidence of that. I assign that statement, your Honor, as incorrect. There is no evidence of any such thing. We are simply referring to the state of the record on the objections to the jurisdiction of the court. I wanted my record to be complete on that matter.

Mr. Neukom: Your Honor, I kept away from that from the very start of this trial. That was brought out solely by Mr. Lavine. [260]

Your Honor, I think as a matter of law possibly I will have to prepare an instruction on that since it has been brought to the attention of the jury, but I think I am correct.

This is not to be taken as law before the jury,

but a person can be interned and can be paroled the next week or next day by the Attorney General. But whether they can or cannot has nothing to do with any crime alleged to have been committed prior——

The Court: I think it is wholly immaterial in the matter of the trial of this case whether he is an internee or what he is.

Mr. Lavine: Exception.

The Court: The matter was material on the matter of law which you argued at the commencement of the trial and upon which the court passed without the presence of the jury and which was the sole concern of the court. I think it is entirely immaterial here for the purpose of the defense, proper defense. The United States Attorney refuses to accept the stipulation.

Mr. Neukom: I will stipulate that he is interned, but I will not stipulate that he is to be interned for the duration because I don't know.

Mr. Lavine: Well, Mr. Neukom, I will accept the stipulation that he is interned now. But do you accept the stipulation further that he has been ordered interned for the [261] duration of the war?

Mr. Neukom: There is not any such order of record.

Mr. Lavine: Have you no such order?

Mr. Neukom: There is no such order. Furthermore, it is entirely immaterial to this case.

The Court: I think it is entirely immaterial.

Mr. Neukom: The Attorney General has ordered him interned. And I think that no argument

should be made upon that score by either side.

The Court: It is immaterial. It is not in evidence. If any objection is made, I shall restrain the argument and instruct the jury to disregard it. How many more motions? No more?

Mr. Lavine: No more.

Mr. Neukom: You have certain readings to make to the jury to strike certain testimony.

Mr. Lavine: Certain testimony, your Honor, that we agreed to strike * * *

The Court: The jury are instructed to disregard the following testimony:

“Q. By Mr. Crawford: Miss Anderson, after that conversation which you just related, did Joan Day then go to work for you?

“A. No. Joan Day did not go to work for me. I didn’t think she was quite experienced enough.”

Mr. Neukom: The rest was Beverlin’s testimony with re- [262] gard to——

The Court: Page 109, line 1: that was previously stricken, the testimony and redirect examination of the witness, Merle Beverlin, or was it Miss Anderson? This is Miss Anderson:

“Q. Who introduced you to Mickey Moore?

“A. Mitzi Bruno did.

“Q. Who is Mitzi Bruno?

“A. Mitzi Bruno is another one of Joe Di Marzo’s girls.”

That is stricken and the jury instructed to disregard it.

The following testimony is stricken from the rec-

ord and the jury instructed to disregard it. This is the redirect examination of Helen Merle Beverlin by Mr. Neukom:

“Q. Now, upon your first trip, I mean, your second trip to Honolulu, that is to say, the one in January 25, 1941 did anyone accompany you in your same cabin or stateroom on that trip?

“A. Yes.

“Q. What was the name of that person?”

The question never got answered.

Mr. Lavine: No, I think it got answered on the next page, your Honor. You have to jump two pages there.

The Court: Oh, yes. Maybe I had better clarify it.

“The Witness: The name was Dianne Stevens.”

I am omitting the colloquy of counsel and the objections. [262-a] This is only the questions and answers.

“Q. By Mr. Neukom: What was her other name, if anything?

“A. Well, I knew——

“I think her other name was Viola.

“Q. Did you ever know whether or not Viola had worked for Joe Di Marzo as a prostitute?

“A. Well, I don't know about working for him as a prostitute. I know the girl was a prostitute.

“Q. Did you ever have any talk with Joe Di Marzo before you set sail when you talked about Viola sailing to Honolulu with you?

“A. Yes. I suggested——

“Q. How long before you sailed to Honolulu was that?

“A. About a week, perhaps. I am not sure of the date.

“Q. That, of course, is the conversation in January of 1941, is it not?”

That is stricken and the jury instructed to disregard it.

“Q. By Mr. Neukom: About how long before?

“A. About a week, perhaps two weeks. I am not sure. I am not definite.

“Q. Where was it?

“A. I am not sure where the place was.

“Q. Was it here in Los Angeles?

“A. Yes, I think so.

“Q. Who was present besides you and Joe?

[262-b]

“A. I believe Joe and I were the only ones present.

“Q. Well, then, what did you say, if anything, with regard to Viola? Or what did Joe say?

“A. Well, I think I suggested that she go along because she was a friend of mine and that I would like for her to go.

“Q. What did Joe say?

“A. Well, that seemed to be quite all right.

“Q. Well, what did he say?

“A. I can't recall the conversation that came up.”

Mr. Neukom: This is all Judy Bradford?

Mr. Lavine: Is that what we restored? Isn't that page 273?

The Court: No, this is page 272, line 16. Page 273 to 276 was restored. That is all.

The portions of the testimony which I read to the jury were stricken from the record on various grounds on motion of the defendant and will be disregarded by you.

(The following discussion was had in chambers in the presence of the Court, and it was stipulated that exceptions thereafter noted by counsel for the defense to the Court's instructions or refusal to give the proposed instructions submitted by the defense was all had in chambers for the purpose of convenience and fully agreeable to the defense, with the [262-c] same effect as though said exceptions to said instructions or exceptions to the refusal of the Court to give specific proposed instructions had actually been made in the courtroom in the presence of defendant and the jury.)

Mr. Lavine: The defendant excepts to the following refused instructions of the defendant:

This one I have put a pencil "A" on it, your Honor, and I would like to number it because there seems to have been no number on it.

The Court: Why not mark those alphabetically?

Mr. Lavine: I will put a separate alphabetical mark on it, "Refused instructions." [262-d]

The Court: That's right. "A", "B", "C", "D", "E", "F", and so forth.

Mr. Lavine: The defendant excepts to the in-

struction "A" refused by the court on the ground that it is a correct statement of the law. It states:

"You are instructed that the testimony of a witness who admits that she has told falsehoods should be subjected to careful scrutiny and considered with great caution and you may reject it."

The defendant excepts to the refusal of instruction "B", numbered at the time as Defendant's Instruction 24, on the ground that it is a statement of the presumption of innocence with which a defendant is clothed.

The defendant excepts to Defendant's Instruction No. 23 being refused, and labelled "C", on the ground that it is an instruction applicable to the facts in the case and is a correct statement of the law relating to the weight to be given to Helen Merle Beverlin.

* * * * *

Mr. Lavine: And it is a measure and guide for the jury by which to weigh the evidence of the principal witness of the Government and the alleged victim in this case.

The defendant excepts to the refusal of Instruction "D", labelled Defendant's Instruction No. 22, and now marked [263] "D", which specifies the necessary elements of the crime charged here and those that are essential for the establishment of the Government's case.

The defendant excepts to the refusal of instruction "E", originally marked Defendant's Instruction No. 21, which is applicable to the specific facts

in the case and specifies that the Government must specifically prove the purpose of the trip where the offense is not made out, and the defendant is entitled to an acquittal.

The defendant excepts to the refusal of instruction "F" originally marked Defendant's Instruction 18, on the grounds that it is a correct statement of the law, that even though Helen Merle Beverlin went to the Hawaiian Islands and engaged in prostitution, if she didn't go for that purpose and intent the defendant is entitled to an acquittal, and it is an instruction applicable to the specific point in the case. It is labelled Defendant's Instruction 18.

The defendant excepts to the refusal of Defendant's Instruction 17, originally marked 17 and now labelled "G", which is a correct statement of specific instruction applicable to the facts of this case setting forth the gravamen of the charge. The court has made a notation on the bottom of the instruction that it is covered.

The Court: Well, I think most of those are covered.

Mr. Lavine: And if it is, of course the objection would not be tenable. But in view of the fact that we are making [264] these objections in advance of hearing the court's actual instructions, it appears to be necessary to reserve the——

* * * * *

Mr. Lavine: The defendant excepts to the refusal of the Defendant's Instruction "H", labelled Defendant's Instruction No. 16, which is specifically

applicable to the facts in the case, that if Helen Merle Beverlin engaged in prostitution in Hawaii it would be no proof that the defendant knowingly transported her or caused her to be transported and that the burden of proof is upon the Government to show this fact by positive evidence.

The defendant excepts to the refusal of Defendant's Instruction "I", originally marked Defendant's Instruction 15, which specifies that if Helen Merle Beverlin was alone responsible for her transportation, the defendant would not be guilty, and is particularly applicable to the facts as established in this case and is an instruction offered in support of those facts.

The defendant excepts to the refusal of instruction "J", originally marked Defendant's Instruction 14, as to the quantity of proof and that when a witness wilfully testifies falsely to a material matter, you may disregard the whole of her testimony; and that it is particularly applicable to the facts of this case, and the testimony of Helen Merle [265] Beverlin.

The defendant excepts to the refusal of instruction "K", originally marked Defendant's Instruction No. 13, which is particularly applicable to the facts of this case regarding the acts of Helen Merle Beverlin as she herself testified to in this case.

The defendant excepts to instruction "L", marked Defendant's Instruction 11, relating to an essential element of the offense, to-wit, guilty knowledge.

The defendant excepts to the refusal of the instruction "M", originally labelled Defendant's In-

struction No. 10, which states that a woman may be an accomplice to her own transportation where she participates actively in bringing about the same, and that it is a guide for the jury in this particular case in relation to Helen Merle Beverlin.

The defendant excepts to the refusal of instruction "N", originally labelled Defendant's Instruction No. 9, as to the measure and guide of circumstantial evidence in a criminal case, and is a correct statement of the law and particularly applicable to this case.

The defendant excepts to the refusal of Defendant's Instruction "O", originally marked Defendant's Instruction No. 8, which states the correct rule of law regarding the presumption of innocence with which a defendant is clothed and which must be overcome by substantial evidence and which applies to the facts in this case. [266]

The defendant excepts to Instruction No. "P", originally marked Defendant's Instruction No. 7, which goes to the credibility and weight to be given to the testimony of Helen Merle Beverlin as the witness in this case.

The defendant excepts to the refusal of giving Instruction No. "Q", originally labeled Defendant's Instruction No. 6, which goes to the question of the specific intent required to be established in this case and relating particularly to the specific evidence in this case for the consideration of the jury.

The defendant excepts to the refusal of Instruction No. "R", originally Defendant's Instruction No. 4, as to the weight to be given to the testimony

of any witness and particularly that a witness when taking the stand puts her truthfulness in issue in the case.

The defendant excepts to the refusal of Defendant's Instruction "S", originally Defendant's Instruction No. 3, which states the correct principle of law, that if Helen Merle Beverlin was solely responsible for her own transportation, then the defendant must be acquitted. The defendant excepts to that instruction further on the ground that it is a correct statement of the exact measure of proof which the jury must weigh in this case, and it goes to the specific facts of this particular case.

The defendant excepts to the refusal of instruction "SS", numbered Defendant's Instruction No. 37 originally, [267] which gives the correct rule of law, that the Government is bound by the testimony of a witness whom it produces, and in offering Helen Merle Beverlin as a witness they represent that this testimony must be accepted as true.

The defendant excepts to the refusal of defendant's instruction "T" originally labelled defendant's instruction No. 36, as applicable to the particular facts of this case and the fact that it was part of the theory of the defendant's case that he was singled out for invidious treatment by law enforcement agencies.

The defendant excepts to the refusal of "U", originally labelled defendant's instruction No. 33. That also applies the same principle, that the defendant is entitled to the equal protection of the

laws, and that he is singled out for prosecution when other persons are not singled out, he must be acquitted.

The defendant excepts to instruction "V", defendant's original instruction 33, also relating to the quantity or rule of law, rather. The party is bound by the testimony given by or in his behalf, and the Government is bound by the testimony given by Helen Beverlin. Can I persuade you on that instruction?

The Court: No. I have been looking for some authority to that effect for a long time.

Mr. Lavine: Look at the Corlin case.

The Court: I read that and the other case there. But [268] those are conclusions that you draw. If you get another instruction in there, you are entitled to the advantage of any testimony brought out on cross examination, and I have added to it that the Government is likewise entitled to it.

Mr. Crawford: Pardon me. Isn't that the one that says we are bound by the testimony of Judy Beverlin and then states we are bound by her testimony if she said she did or didn't want to go? That would sound as if that were the law, if she said she did or didn't want to.

Mr. Lavine: I make the offer and except to the refusal of the instruction.

The Court: That one and all the others.

Mr. Lavine: I am running out of the alphabet. I have one down to "X" already.

The defendant excepts to the instruction lettered "X", originally defendant's instruction No. 31,

which relates to the question of jeopardy. This instruction places the duty upon the jury to find the facts and sets forth the law applicable to the facts in the case.

The defendant excepts to the refusal of defendant's instruction "Y". This instruction relates specifically to the charge of the statute and confines the statute to the specific charge alleged in the indictment.

The Court: That is a quotation of the statute?

Mr. Lavine: Yes.

The Court: I will read as an instruction on quoting [269] the law the proposed instruction of the Government.

Mr. Lavine: Now, the defendant will except to the proposed instruction of the Government reading the entire statute because the cases hold that each subsection of the statute is a different and separate offense and the defendant is only charged with transporting or causing to be transported in this indictment. He is not charged with the other subsections of the offense. Therefore, to read the entire statute would be to mislead the jury and give them portions of events which are not alleged in this indictment and place the defendant on trial on something not alleged in the indictment. For that reason I submit this defendant's instruction "Y" which covers the particular section of the statute under which the defendant is charged and eliminates the sections of the statute under which he is not charged and which have been defined in

a series of cases each as separate and distinct offenses.

* * * * *

Mr. Lavine: I except to the Court's reading the statute.

* * * * *

[270]

The Court: I think maybe you are correct there. I will modify this. All right.

Mr. Lavine: With that correction, merely that portion of instruction "Y" from Lines 14 to 19 should be included in the charge. I don't know how you are covering that.

The Court: I have covered that too many times, probably. In reading this over it seems as though every other word says that it is up to the Government to prove beyond a reasonable doubt that he transported or caused to be transported Helen Merle Beverlin.

Mr. Laverne: In instruction "Z" it is applied to the word "cause."

Mr. Neukom: You have the general printed form on "reasonable doubt?"

The Court: Yes, I have the general printed form.

* * * * *

Mr. Lavine: I except to the refusal of the Court to give instruction "Z", as a correct statement of the law, a correct definition.

I also except to the refusal of instruction "AA", originally labelled defendant's instruction No. 40 which goes to the question of jeopardy and states

the ground upon which the defendant urges the plea of once in jeopardy in this case. [271]

Also instruction "AB" labelled defendant's instruction No. 38-A which also sets forth principles of law relating to the plea of once in jeopardy and what it is the duty of the jury to determine under that plea.

The defendant excepts to the refusal of instruction "AC", originally Defendant's Instruction No. 26, which also relates to the plea of once in jeopardy and whether a conspiracy involving two persons, if there were only two persons involved, and an acquittal of one, would acquit the other, as applied to the facts of this case.

And Defendant's Instruction "AD", originally Defendant's Instruction No. 34, general instruction, relating to the reasonable construction of the evidence.

Now, the defendant also excepts to the court's instruction—do you want to give this a number?

The Court: That will be No. 3.

Mr. Lavine: May I head this "Court's Instruction No. 3"?

The Court: Well, it is just "Instruction No. 3."

Mr. Neukom: Commencing with the words "I conclude" and ending with the word "defendant."

Mr. Lavine: Which declares "That no person shall be subject to the same offense to be twice in jeopardy of life or limb." The court in that instruction says:

"For the plea of once in jeopardy to be valid, it must appear that the offense is identical in law and

in fact. That is to say, however nearly the of- [272] fenses may be connected in fact, there is no identity so as to constitute jeopardy, if the offenses are not the same in law. And whether the record, as distinguished from the evidence, in Case No. 15,499 shows the identical offense on its face as the face of record in this case, as distinguished from the evidence, is a matter of law. The responsibility for the determination of that question of law belongs to me as the Judge.

“I conclude and instruct that as a matter of * * *”

The Court: “I instruct you.” They omitted the “you.”

Mr. Lavine: “I * * * * instruct you that as a matter of law the offense charged in case No. 15,-499 is and was not the same as the offense charged against the defendant in this case * * * *”

With this interpretation of the law, the defendant excepts. It excepts first of all to the court's refusal to let the jury determine the facts and, secondly, to determine whether the facts in 15,499, the case on trial here, and excepts further that the interpretation of the law, as given by the court in this case, is not a correct statement of the law, as one could be in jeopardy if he was tried on part of an offense, no matter under what title it may be, or if he was acquitted on part of an offense, even though not placed on trial.

It is the contention of the defendant here that the acquittal of Helen Merle Beverlin operated as an acquittal, [273] as a matter of law, of the defendant Di Marzo in case 15,499 and that, therefore,

if the jury did find that it was the same defendant, the same facts, that it would have a right to acquit the defendant in case 15,500.

The defendant also excepts to the further language of that instruction: "There is then, not the identity of law and fact necessary to support the plea of once in jeopardy."

The question of fact for the jury to determine is in accordance with the question as to the law. This instruction, therefore, incorrectly sets forth the principles in view of the evidence in this case.

The defendant excepts to the further language of the instruction, "You are hence advised to return your verdict on the defendant's plea of once in jeopardy for the Government and against the defendant" as an incorrect statement of the law and an incorrect conclusion of the facts drawn.



(Proceedings were resumed in the courtroom in the presence of the jury:)

THE COURT'S INSTRUCTIONS TO THE JURY

The Court: Gentlemen of the jury, it is now incumbent upon me to instruct you concerning the law.

In addition to the issue of guilty or not guilty the defendant has presented the issue of whether he has been formerly acquitted or once in jeopardy. It will be necessary for you to determine both issues by your separate verdicts. [274] Whatever your

verdict on the guilt or innocence of the defendant, it will be necessary nevertheless to return a verdict on the plea of once in jeopardy. Each plea requires a separate verdict.

You are the sole judges of the facts in this case. You may acquit the defendant of the charge here and also find for the defendant on the plea of former jeopardy; or you may acquit the defendant and find for the Government on the plea of once in jeopardy; or you may convict the defendant and find for the Government on the plea of once in jeopardy. But each finding is separate and distinct and must be the result of your own individual opinion and judgment based on these instructions and the facts in this case.

You are not to be prejudiced in any way on the issue of not guilty or guilty by reason of the plea or verdict that you may find in this case in connection with the evidence regarding jeopardy. Each is a distinct issue for you to decide. The Court's instructions on each are to be considered independently of the other.

The Constitution of the United States declares:

“That no person shall be subject for the same offense to be twice in jeopardy of life or limb.”

Where a defendant relies upon this clause of the Constitution he makes what is called a plea of “once in jeopardy.” The defendant in this case has made such a plea.

The indictment in Case No. 15499 of this Court—that [275] is not the number of this case, it is 15,-

500—and the Minutes thereon were read in evidence. The defendant contends that inasmuch as he and Helen Merle Beverlin were jointly charged in that case with conspiring to violate the Mann Act, and that inasmuch as Helen Merle Beverlin was acquitted in that case he was, solely by operation of law, likewise acquitted, and that he was thus placed in jeopardy for the offense for which he is now on trial.

For the plea of once in jeopardy to be valid, it must appear that the offense is identical in law and in fact. That is to say, however nearly the offenses may be connected in fact, there is no identity so as to constitute jeopardy, if the offenses are not the same in law. And whether the record, as distinguished from the evidence, in case No. 15499, that is, the other case, show the identical offense on its face as the face of the record in this case, as distinguished from the evidence, is a matter of law. The responsibility for the determination of that question of law belongs to me as the Judge.

I conclude and instruct you that as a matter of law the offense charged in case No. 15499, the other case, is and was not the same as the offense charged against the defendant in this case.

There is then, not the identity of law and fact necessary to support the plea of once in jeopardy.

You are hence advised to return your verdict on the [276] defendant's plea of once in jeopardy for the Government and against the defendant; but you must, nevertheless, return a verdict.

By the finding of an indictment no presump-

tion whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A presumption, as used in that sentence and as used throughout the trial and in the following instructions, is a deduction which the law expressly directs to be made from particular facts. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. Mere suspicion will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after fairly and impartially considering all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs.

Reasonable doubt is not a mere possible or imaginary doubt or a bare conjecture; for it is difficult to prove a thing to an absolute certainty.

You are to consider the strong probabilities of the [277] case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered

in connection with and as accompanying all the instructions that are given to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity or his motives; or by contradictory evidence. In judging the credibility of the witnesses in [278] this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the re-

lations which he bears to the Government or the defendant, his interest in the outcome, and the manner in which he might be affected by the verdict and the extent to which he is contradicted by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. The masculine includes the feminine in these instructions. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should *district* his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness' testimony.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses; you are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction to that effect in the law. [279]

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime; the other is testimony in proof of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence.

Circumstantial evidence may consist of admissions by the defendant, plans laid for the commission of the crime; in short, any act, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime.

Where the evidence is entirely circumstantial it is necessary before you can convict that the evidence be not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion.

Indirect evidence is that which tends to establish the fact in dispute by proving another and which, though true, does not in itself conclusively establish that fact but which affords an inference of its existence.

The defendant is entitled to the same fair trial as any person of American citizenship and regardless of whether he is confined in an internment camp.

You must disregard the remarks of the prosecutor as to whether the defendant might be paroled from the intern- [280] ment camp, as this is a matter entirely within the scope of the persons having him in custody.

You are instructed that the defendant is charged in this indictment with a violation of the White Slave Traffic Act, more commonly known as the Mann Act. The section of the Act which the defendant is charged with violating provides as follows:

“* * * Any person who shall knowingly trans-

port or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice * * * shall be deemed guilty of a felony and upon conviction thereof shall be punished * * *."

You will note that I have omitted reading to you what the punishment, if any, would be if the defendant is found guilty, for the punishment is a matter solely to be decided by the Court should you find the defendant guilty.

You are instructed that "debauchery" means that the girl is to be subjected repeatedly to unlawful sexual [281] intercourse, fornication or adultery.

You are instructed that Webster's Dictionary defines the word "transport" to mean "to carry or convey from one place to another." The word "cause" means to "effect a thing, as an agent; to bring it about."

You are not to be prejudiced against the defendant by reason of the nature of the charge, or by reason of any testimony regarding any violations of local law or to any immoralities, as these are not the issues in this case. It is your duty, regardless of any testimony that may have been pro-

duced along this line, if you have a reasonable doubt as to the guilt of the defendant on the charge of transporting or causing Helen Merle Beverlin to be transported from Los Angeles to Hawaii, to acquit him.

The Federal Courts deal only with violations of the federal law, and where the evidence in a prosecution under the Mann Act is insufficient to show a violation of the statute, a conviction cannot be sustained no matter what acts of impropriety the parties may have been guilty of,—they being amenable for such acts to the local authorities and not to the Federal Government,—if the evidence shows that they are guilty of any such improprieties, and if you find that the evidence is insufficient to show that the defendant, Joseph Di Marzo, transported or caused Helen Merle Beverlin to be transported, you must acquit him.

There is no presumption in law that a person who has [282] been a prostitute will continue to be one, or that she may not stop at any time, and there is no presumption in law that when Helen Merle Beverlin left Los Angeles on or about January 24, 1941, she intended to engage in or be in the business of prostitution when she reached Hawaii. This is a fact to be proved, like any other fact in the case, and it is incumbent upon the Government to prove that Helen Merle Beverlin left Los Angeles for the purpose of engaging in prostitution and that this knowledge was brought home to Joseph Di Marzo at the time she left Los Angeles.

If you find that Helen Merle Beverlin commit-

ted acts of immorality in Hawaii, that alone would not make the defendant guilty of violating the White Slave Act, for the gravamen of the offense is the interstate transportation with intent at the time of the transportation that Helen Merle Beverlin engage in prostitution or sexual immorality.

If the Government established that Helen Merle Beverlin engaged in sexual intercourse after she left the United States, such fact alone would not prove that the defendant transported or caused Helen Merle Beverlin to be transported for such immoral purpose or with such intent.

If you find that the defendant did not transport her or cause her transportation, you must acquit him regardless of any other causes or other reasons or persons who might have brought it about, if they did.

You are instructed that if you find that Helen Merle [283] Beverlin was solely responsible for her own transportation, then you must acquit the defendant.

The character or reputation of the woman named in this indictment is not an issue in this case and the mere fact that she may have been a confirmed prostitute, at all times mentioned in the indictment, is immaterial, excepting insofar as it may have a bearing on the purpose of the alleged transportation or the weight of her testimony, and you are not to consider the fact, if it be a fact, that she willingly assented to the transportation.

In order to constitute the offense with which the defendant is charged, it is not necessary that

such woman or girl actually be placed in a house of prostitution or otherwise debauched if the intent of the defendant is clear. If, however, it appears that such defendant so intended by the transportation of such woman or girl to bring about any of the foregoing ends, then and in that case he is guilty of the offense charged.

The woman transported is not an accomplice to her transportation whether she goes willingly or unwillingly and her testimony may be viewed in the same light that any other witness' would be viewed and need not be corroborated if you are willing to believe it alone and without corroboration.

Compulsion is not one of the essential elements of the crime charged. In other words, in order to find the defendant [284] guilty it is not necessary that you find that he forced Helen Merle Beverlin to go from Los Angeles to Honolulu, Territory of Hawaii, against her will and without her consent.

It is sufficient to warrant a verdict of guilt if you are convinced beyond a reasonable doubt from the evidence before you that the defendant knowingly induced, persuaded, aided, abetted, or caused this woman to go from Los Angeles to Honolulu with the intent and purpose on the part of the defendant that she would engage in prostitution or debauchery, or any other immoral purpose, or that he aided or assisted in knowingly persuading, inducing, or enticing her and that he thereby knowingly caused or aided or assisted in causing this

woman to be carried as a passenger on a common carrier in interstate commerce, that is to say, upon a steamship sailing from the Port of Los Angeles to the City of Honolulu, Territory of Hawaii. Whether or not the woman went as is charged, if you find she so did, with or without her consent, is immaterial.

The giving of money to Helen Merle Beverlin would not itself be a violation of the law, nor would receiving money from Helen Merle Beverlin after she returned from Hawaii, be a violation of the law in question. It is only if the defendant transported or caused the transportation of Helen Merle Beverlin in interstate commerce that would be a violation of the law.

The defendant may be found guilty of the offense charged [285] in the indictment even though he in fact did not directly purchase her steamer ticket, and even though the money which was actually used was not the money that he provided, for the law does not require that the woman who is transported in interstate commerce for immoral purposes must use the identical money that is received from the defendant. It is sufficient if he aided or abetted in any wise the woman in connection with her transportation from Los Angeles to the Territory of Hawaii with the intent upon his part that the purpose of this transportation was to have Helen Merle Beverlin engage in prostitution. And this is true even though in fact the woman so transported did not actually engage in prostitution when she arrived at the destination.

As a matter of law if you find beyond a reasonable doubt the defendant did transport, cause to be transported, or aid or assist the transporting of Helen Merle Beverlin from Los Angeles County to the City of Honolulu, Territory of Hawaii, with the intent on his part for the purpose of having said woman practice prostitution, or for other immoral purposes, the Territory of Hawaii is such a place or territory as comes within the jurisdiction of the Act. In other words, if a person transports or aids or assists the transporting of a woman from the United States to the Territory of Hawaii with the intent and purpose to have such person practice prostitution, such a place, namely the Territory of Hawaii, is the same as though the person had [286] been so transported between one state and another.

The offense of interstate transportation of a woman for immoral purposes is complete the moment the woman has been transported across the state line with the immoral purpose or intent in the mind of the person responsible for her transportation; and the immoral conduct and relation of the parties, if they either did or did not exist, are in no wise elements of the offense.

The means of transporting a woman across the state line or from this State to the Territory of Hawaii, for the purposes denounced in the statute, the violation of which the defendant is charged, is not material. Transportation could be effected by the person either travelling on steamship or airplane or any other means that was utilized in causing her

transportation from Los Angeles to the City of Honolulu, Territory of Hawaii.

A defendant may rely on the evidence produced on cross examination from the Government's witnesses for his defense, and you must consider any matters so brought out in his behalf. The converse is equally true of the Government's case and the defendant's witnesses.

You are instructed that intent is a material factor in this case and unless the defendant had the intent to do as charged in the indictment, he cannot be found guilty. The law presumes that every man intends the natural and ordinary consequences of his acts. There must be an intent [287] to commit the unlawful act and that intent must be corrupt.

Intent is a state of mind. We do not have the faculties of being able to dissect a man's mind, ascertain what his intent was as of any given time or at the time as charged in the indictment. Consequently, to determine what a person's intent is, or was, it is proper to consider all the facts and circumstances of the case that tend to shed light as to what was the defendant's intent as of the period charged in the indictment. In this connection it is competent to consider the defendant's previous and subsequent acts and declarations which tend to shed light to determine what his intent was at the specific time charged in the indictment. In other words, in arriving at what was the intent of the defendant on or about January 24, 1941, at the time the Government charged the defendant did unlawfully cause

to be transported Helen Merle Beverlin, also known as Judy Bradford, from Los Angeles, California, to the City of Honolulu, Territory of Hawaii, with the intent on his part and for the purpose of having said Helen Merle Beverlin practice prostitution and debauchery, and for other immoral purposes, you are at liberty in arriving at the intent that may or may not have existed at the time as charged, to consider the actions and declarations of the defendant which occurred before and after this date that were admitted in evidence.

Evidence which has been admitted in this case which infers that the defendant has aided or assisted the trans- [288] porting of other women in interstate commerce for the purpose of prostitution, or any evidence which tends to show or from which it may be inferred the defendant aided or assisted or caused to be transported Judy Bradford, also known as Helen Merle Beverlin, from Los Angeles to Honolulu, Territory of Hawaii, before the time as charged in this indictment, is only admitted upon the question of intent that may or may not have existed upon the part of the defendant at the time as charged in this indictment.

In other words, other similar transactions are admissible only for one purpose, that is, to show the existence or non-existence of the intent as charged in the indictment.

With relation to the testimony of those witnesses pertaining to their having been employed in prostitution by the defendant, you are to confine the use of that particular testimony entirely to the question

of intent or purpose as it relates to the crimes which are charged in the indictment. Even if you should find that the defendant was immoral or had associated with people engaged in immoral practices, such as prostitution, or had committed other violations, he is not on trial for those. But you may take the testimony of those witnesses with what credibility you give them and determine whether or not that throws any light upon the question of intent of the defendant as charged in the indictment, namely, as to the transportation of the person named in the indictment, for the purposes [289] specified.

As stated, the statute makes the intent and purpose an element of the crime, and if the journey was planned with no immoral purpose at the time, no crime was committed no matter what may have occurred thereafter. It is the immoral purpose which renders such interstate commerce criminal. The immoral relationship, standing alone, unconnected with interstate commerce, does not violate the Act. Inducing a girl to go from one state to another with any other purpose, except the formed intent at the outset, is insufficient to constitute a violation of the statute. Therefore the essential elements of the offense as defined in the statute are (1) knowingly transporting or causing to be transported in interstate commerce a woman, or a girl, (2) for the purpose of prostitution or debauchery or for any other immoral purposes.

You are instructed that there is no excuse or defense to the defendant on trial in this case that others are not on trial, or possibly have not been in-

dicted, even though you may believe that others were implicated in the charge now before you. You are to consider the guilt or innocence of the defendant Di Marzo without regard to the culpability, or lack of culpability of others not on trial, or possibly as to others who may not have been indicted.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that [290] by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room, and any juror should not hesitate to abandon his own view when convinced that it is erroneous. In determining what your verdict shall be you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded. The opinion of the Judge as to the guilt or innocence of a defendant, if directly or in-

ferentially expressed in these instructions, or at any time during the trial, is not binding upon the jury. For to the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these instructions.

You will now retire to the jury room—— [291]

Mr. Lavine: May it please the Court, there is a stipulation which I think we should enter at this time, that we have excepted to certain refused instructions outside of the presence of the jury, which should be deemed as excepted to before the jury or excepted to before the Court and passed upon by the Court, so that the record will show that.

Mr. Neukom: We will stipulate, your Honor, that all the objections that were made in the record may be deemed to have been now and the Court's denial of them, those that were denied, the exceptions granted to the defendant.

Mr. Lavine: Now, your Honor, there were three or four that your Honor read that were apparently not in the group in which you gave instructions rather than refused them as to which no exception was noted because I did not wish to interrupt your Honor.

The Court: Very well.

Mr. Lavine: There was an instruction which your Honor gave that there was no excuse or defense to the fact that there were others not charged. We except to that instruction, according to our offer of proof, that there was specialized treatment or in-

sidious treatment to this defendant, and that we except to that charge.

We except also to the charge as given under the definition of the statute and in which I thought your Honor was going to stop at a certain point, but your Honor went on to [292] read other portions of the statute which were not included in the indictment as alleged here, that is, aiding and abetting and also persuading, inducing, etc., which are in the statute, but not in the indictment and, therefore, went beyond the scope of this indictment and to which I, therefore, except.

Mr. Neukom: I think they are proper, your Honor, under 18 U. S. C. A. 550. A person can be charged as a principle who aids or abets.

The Court: He is making his exceptions. I have come to my conclusions that he is wrong.

Mr. Lavine: Yes, your Honor. And your Honor gave no definition of the words "aid and abet," and in view of the instructions that your Honor gave I am excepting to the instructions on the ground that it is an incorrect statement and beyond the scope of this indictment.

The Court: Do you wish an instruction as to what aider or abetter are?

Mr. Lavine: Yes, your Honor. I think that is material in view of the fact that your Honor gave the instruction.

The Court: All right.

Mr. Lavine: Your Honor gave the instruction also that a woman is not an accomplice. I feel that in view of the Holtey case that she is an accom-

plice. I except to the instruction because where she directly participates in any particular act, she would be an accomplice under the particu- [293] lar case that I cited.

The Court: My judgment in this case was overruled by the Gebardi case, a later case.

Mr. Lavine: I think the Gebardi case distinguished it from the former case, and, therefor, did not overrule it. And I except to your interpretations.

The Court: I think it is defined in the statute.

Mr. Lavine: There is a state definition, your Honor, which is——

The Court: I think there is one in the federal statute.

Mr. Lavine: I simply wanted the word “abet” defined. I may have a stock instruction used in the state courts, your Honor.

Then the defendant also wishes to except to the use of “other acts and transactions” which your Honor gave some instructions regarding, as being admissible under any circumstances here in relation to subsequent acts and transactions.

The Court: Your exceptions are noted of record and denied, except “aider and abetter.” If I can find it, I will instruct on the statutory definition on that.

Mr. Lavine: I withdraw my request, your Honor, for that as I view it now, for the reason that the statute makes such an aider and abetter a separate offense which is not alleged in this indictment.

It is my view that the statute [294] provides for each violation under a separate sub-head and that the charges of aiding and abetting, persuading or inducing, are each separate and distinct offenses which must be alleged by indictment and which are not alleged in this case.

I wish your Honor would also instruct the jury that any of these arguments that we have made are not binding on them nor to be considered.

The Court: Yes. The jury are instructed to disregard the remarks of counsel and not to consider them the law. You will consider the law that I give you.

Mr. Lavine: My position on that, your Honor, I think I have stated. Therefore, I withdraw any requested instruction on that subject in view of the fact that the indictment does not contain any such allegation. It would require a separate and distinct indictment. There would be a separate statute on that subject, your Honor.

The Court: No, there isn't. Title 18, 550?

Mr. Neukom: 550.

Mr. Lavine: I am abandoning my request on the grounds specified.

The Court: Do you desire an instruction on "aiding and abeting"?

Mr. Neukom: No.

The Court: And you withdraw your request?

Mr. Lavine: Yes. [295]

Mr. Neukom: Very well.

The Court: There are two. The jury will retire to the jury room and elect one of your members

as foreman. There will be handed to you by the bailiff two forms of verdict. One of them reads as follows:

“We, the jury in the above-entitled case, find for the (Government) (Defendant, Joseph Di Marzo) on said defendant’s plea of once in jeopardy.”

When you have reached a conclusion on that, the foreman will sign it and strike out either the word “Government” or “Defendant, Joseph Di Marzo.”

If you find for the Government, you strike out “Defendant, Joe Di Marzo.” If you find for the defendant, you strike out the “Government.”

The other verdict:

“We, the Jury in the above-entitled case, find the defendant, Joseph Di Marzo (blank),” that is, guilty or not guilty, “as charged in the Indictment.” It is to be signed by the foreman.

When all of you have reached a verdict, it is necessary for you to have a unanimous verdict in a federal case. Therefore, when all of you have agreed, you will advise the bailiff and return to this courtroom.

Mr. Neukom: May I, your Honor, respectfully request the Court to advise the jury, in view of your instructions, that as to the former jeopardy in the verdict that it is [296] their duty to strike out the words “defendant, Joseph Di Marzo” because they have been instructed to find for the Government?

The Court: No.

Mr. Lavine: I except to the remarks of Government counsel at this time.

The Court: You don't need to except to them. I am declining his request. I have advised the jury.

Mr. Neukom: I see.

The Court: I have instructed them what the law is and advised them to return their verdict as to the defendant's plea of once in jeopardy either for the Government or for the defendant.

Mr. Neukom: Very well.

The Court: And in an advisory capacity that is as far as I can go. You still must reach your verdict yourselves, gentlemen.

Mr. Lavine: Exception noted, your Honor, to the advice.

The Court: It has been stated in the state courts that where the jury does not follow the judge's advice that the judge sometimes grants a new trial.

Mr. Lavine: They can't on that one, though.

Jury Retires. [297]

JURY RETURNS

[Title of District Court and Cause.]

VERDICT

“We, the Jury in the above-entitled case, find for the (Government) * * * on said defendant’s plea of once in jeopardy.

(Signed) H. M. BURGESSON

Foreman of the Jury

“Dated: Los Angeles, California, September 18, 1942.”

[Title of District Court and Cause.]

VERDICT

“We, the Jury in the above-entitled case, find the defendant, Joseph Di Marzo, guilty as charged in the indictment.

(Signed) H. M. BURGESSON

Foreman of the Jury. [298]

Dated: Los Angeles, California, September 18, 1942.”

The Court: Do you wish the jury polled?

Mr. Lavine: Yes, your Honor.

The Court: All right. Will you poll the jury on each verdict?

Mr. Lavine: Will you explain to the jury, your Honor, the purpose of polling?

The Court: I don’t know that it is necessary to explain the purpose of polling.

Mr. Lavine: Sometimes jurors don't understand that this is their opportunity to express their individual opinion.

The Court: The individual's decision, not opinion.

(July Polled.)

(Thereupon the Jury was excused.)

The Court: Now, the procedure on conviction under the state law: There is a requirement of sentence within a certain period of days, and not before a certain period of time.

Mr. Lavine: There is no time within which——

Mr. Neukom: There is some doubt on that, your Honor?

The Court: Sir?

Mr. Neukom: I have never been able to straighten myself out on it. There is some doubt on it. There is some [299] Supreme Court rule that a person must be sentenced within, as I understand it, five days after conviction unless he himself waives it or does not require it.

The Court: Well, there is a provision that they shall be sentenced promptly. Then there is a provision that they must file a notice of appeal within five days. So they can't appeal before they are sentenced.

Somebody figured out—maybe a Supreme Court Judge—that, therefore, they had to be sentenced within five days.

Mr. Neukom: We do not, your Honor, as long as the defendant makes no point as to whatever your Honor's pleasure is.

The Court: That is the sentence here? What is that section?

Mr. Neukom: 18. 398 is the section.

Mr. Lavine: In this case, if your Honor pleases, it is an idle act in view of the situation the defendant is in. I think your Honor understands the situation. He is in incarceration in one place as much as another, and I assume, however, that whatever your Honor's judgment will be in the matter on any other proceedings that we might want to follow here in respect to this matter, as far as either——

The Court: Well, is the defendant ready for sentence at this time? In whose custody does he go now? Ordinarily he is remanded to the custody of the marshal. He is now in the custody of the Immigration office. [300]

Mr. Neukom: That is the thing, your Honor, that I would appreciate some advice on.

The Court: Well, I have got to make a decision right now.

Mr. Neukom: Unless the defendant urges that, I would like to get the advice of the Attorney General on that because the defendant is still in the custody of the Immigration authorities and they are charged with the responsibility, in abeyance to the presidential warrant, the order of internment, to take him back to the camp. I haven't been able to determine what is the law under that circumstance because I don't anticipate such a thing as that until the case is over with.

The Court: Well, I think that some decision along the line is going to have to be made, and I must make it now whether or not he shall be remanded to the custody of the marshal and the case continued for sentence or whether or not he shall be remanded to the custody of the Immigration officers. He, of course, is in the custody of the United States in either event.

Have you any ideas you wish to impress upon the Court with respect to that?

Mr. Lavine: Well, we naturally take the position, your Honor, that he is still in the custody of the Immigration officers and should remain there and that further, of course, in order that my rights may be preserved I take the position [301] that all these proceedings were without jurisdiction because he is still in the custody of the Immigration Department and never was released actually for purposes for granting this court jurisdiction.

I simply preserve my record on that phase of it. However, I feel that your Honor will not be prejudiced nor will the Government be prejudiced by any order of your Honor in continuing him in the Immigration officers' custody. He is still in custody, and we will certainly not raise any objections over his being in that custody.

Mr. Neukom: Your Honor, I would prefer that he would remain there. Of course, while he would come before you, if he is put into the custody of the marshal, he then is subject to applying for release under bond.

The Court: Well, if he gets released on bond,

then the Immigration authorities take him again. So he could go to the custody of the marshal, and put up his bond, and walk out the door into the arms of these two gentlemen who seem to be around wherever the defendant is.

Mr. Lavine: That is what happened to him the time he got released before. And they have been very much present at all times.

The Court: I am a little inclined to think that the presidential order of arrest and the executive order under which it was made, as well as the statute authorizing the executive order, is, in effect, a modified form of martial [302] law, and that while the Civil courts may proceed to try and convict persons for violations of the federal laws, nevertheless that so long as the state of emergency, that is, declared unlimited emergency exists, as does exist at the present time, and so long as the presidential warrant is outstanding, it would take precedence by virtue of the modified martial law over any order of this court for the custody of the body of the defendant.

That is certainly not any final conclusion, but that will indicate to counsel what my inclined opinions are, if I may say. So that when the matter comes up for sentence, if you have anything to offer on that subject I would appreciate it.

Mr. Lavine: Well, it seems to me, your Honor, that I have this suggestion to make, and there is no reason why it can't be made now: Perhaps a suspended sentence would serve all the ends of the

Government; and he will be confined, and I think that——

The Court: No, I don't think that the facts in this case nor the crime warrant a suspended sentence. That is my present conclusion. Of my own motion I will put it over until Tuesday morning for sentence. [303]

* * * * *

The Court: You have your motion for a new trial which I have read. It is not supported by any affidavits.

Mr. Lavine: Well, it is supported by an affidavit by me your Honor.

* * * * *

Mr. Lavine: However, I intended at this time to put on the Bailiff or Marshal who had charge of the jury, for the purpose of having the exact testimony produced, as my knowledge, of course, was gained from information, and I believe it was correct.

The Court: You were present in my chambers, Mr. Lavine.

Mr. Lavine: I was present in your chambers.

The Court: When the communication came to me. Therefore, I do not think you are warranted in the implication, in filing this affidavit, that you are informed and believe that there was private communication. You know whatever private communication there was.

Mr. Lavine: Now let us get the exact facts, if your Honor pleases, if I have not stated them cor-

rectly. My first knowledge of that fact came from information from the Clerk who passed into your chambers, stating that the jury wished to get further instructions. Now, I had no communication with the jury, so that——

The Court: You were present. [304]

Mr. Lavine: I was present in your chambers when the Clerk passed through and stated that. And after the Clerk had conversation with you——

The Court: Well, let us put the Clerk on the witness stand, then, if you want him.

Mr. Lavine: Yes. I would like him, and also the Bailiff, because——

The Court: All right.

(The Clerk was duly sworn by the Court.)

J. M. HORN

called as a witness herein, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

At Friday afternoon, after the jury retired in this case, I received a communication from the United States Marshal, a Deputy, regarding a request from the jury for further instructions or for reading of instructions. I, myself, did not talk to anyone on the jury.

(Testimony of J. M. Horn.)

(Questioning by the Court.)

I was in chambers, in the presence of Judge Hall. And Mr. Fuller was presnt, Mr. Neukom, and Mr. Lavine. Mr. Fuller said that the jury would like to have the instructions of the Court, and your reply was: "Well, what is the custom?" I said, "My understanding is that the custom is that the judges do not give the instructions to the jury, [305] but should the jury request further instructions, or instructions re-read, they usually ask the jury to come into the court room."

"I will give them, but I will not send up the instructions, written instructions, to the jury for their perusal." That was my statement—that if the jury wanted the instructions that you would read them in open court, but that you would not send up the written instructions. Mr. Lavine did not make any objection to that statement that I remember, nor did Mr. Neukom, of the United States Attorney's office. Mr. Lavine did not state that he desired that it be made a matter of record. He did not make a statement indicating an exception to the statement; which you had given to the Marshal.

(Questioning by Mr. Lavine.)

This conversation with the judge with reference to what word I should send to them was held in his chambers. It is not a fact that I went through the chambers and informed Mr. Neukom and you, who were present in the chambers, as to the proceeding

(Testimony of J. M. Horn.)

and then went into the adjoining room where the judge was at the time, not to my knowledge.

(Questioning by the Court.)

Your statements were made in the presence of Mr. Lavine and Mr. Neukom, and myself, and the Marshal? That is the statement which I have just repeated.

(Questioning by Mr. Lavine.) [306]

You made no statement to the judge with reference to the matter?

Mr. Lavine: Will your Honor stipulate that we did have a conversation in which I stated that the State practice is to send up the instructions to the jury, and that it was satisfactory with me if your Honor wished to send up the instructions; and then that there was a discussion between yourself and Mr. Neukom and myself in which Mr. Neukom stated that the jury might pick out some single instruction, or something of that sort, and he did not want it done?

The Court: That was stated after I had instructed the Marshal that if the jury desired me to read the whole of the instructions, I would read them, or if they desired any one instruction, to bring them back to the court room and I would read it to them.

Mr. Lavine: Where was that instruction, your Honor, so that our record may be clear?

The Court: That instruction was in the chambers, in your presence and in the presence of Mr. Neukom.

(Testimony of J. M. Horn.)

Mr. Neukom: I will so stipulate.

The Court: But before any communication that you made. I do not recall what you said. My recollection is that you said they did do it in State Court.

(Questioning of the Clerk by Mr. Lavine resumed.)

The Defendant was not present in the chambers at any time. The Court was not reconvened at any time after that [307] with reference to the instructions—not until the jury returned with their verdict. That was at approximately 4:30, I think. The records will reflect that. The request was made to me I think a very few minutes after they adjourned. That is, after they had been sent to the jury room for deliberation. I would have to refer to my records for just when they left the courtroom.

By the Witness:

I think that my records reflects that they left at 3:59. I am not positive. They were only out about 30 minutes all told.

(Questioning by the Court.)

I was present in your chambers when the Marshal came and said the jury had a verdict. Neither the defendant's counsel nor the United States Attorney nor the defendant were present when the Marshal informed you of that.

The Court: So that was a proceeding outside of the presence of the defendant.

Mr. Lavine: That is correct.

(Testimony of J. M. Horn.)

(Questioning by Mr. Lavine.)

After the judge talked to me with reference to the judge's statement that he would not send the instructions up to them. I merely informed the Bailiff. Well, the Bailiff was present at that time. So it was not a matter of informing him. He knew just what he would do. I suppose the Bailiff returned and told the jury. [308]

Examination

By Mr. Neukom:

I did not talk to that jury from the time they were out until they came back. And when the jury came back and brought in their written verdict and it was in the hands of the Foreman, Mr. Lavine had not made one single statement in objection to the fact that the Court had not re-read or sent up the instructions to the jury.

The Court: The defendant was present at the time that the jury returned.

Mr. Neukom: That is correct.

Mr. Lavine: We will stipulate to that.

The Witness: It is correct.

Mr. Lavine: At the time they returned with their verdict.

GLENN C. FULLER

called as a witness herein, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

My name is Glen C. Fuller. My position in this court is Bailiff. I was in charge of the jury that was deliberating in the case of United States v. Di Marzo on Friday, September 18, 1942.

After the jury had been in the jury room deliberating possibly five or ten minutes there was a rap on the door. [309] I knocked, rapped back, as we usually do, and opened the door. Then the Foreman had a request. He asked me to see if I could bring the instructions from the judge to the jury room. I said to him, "I will try." Nothing else was said then. I closed the door and locked it. Then after that I came to the court room and informed the Clerk, Mr. Horn, of the request of the jury. Mr. Horn and I, together, went into the judge's chambers. I saw the judge at the time in the judge's chambers. Mr. Horn informed the judge of the request of the jury. He told the judge that the jury wanted the instructions. The judge asked the Clerk something concerning the custom. There was a little discussion between Mr. Horn and the judge in regard to the custom. When the judge asked concerning the custom, I think that Mr. Horn said something about—if I remember right—that not any—as a rule, they did not send them to the deliberating room. The judge said to Mr. Horn, "I will read part

(Testimony of Glenn C. Fuller.)

or all of the instructions if they desire, but not send them to the jury room." I went back to the jury room.

(Questions by the Court.)

During this conversation Mr. Lavine and Mr. Neukom were in the room; and within hearing of the conversation had. As a matter of fact, you stood on one side of the room and I stood on the other.

Q. By Mr. Lavine: Was the defendant present?

The Court: In chambers? [310]

Q. By Mr. Lavine: In chambers?

The Court: He was not.

The Witness: He was not. I didn't see him.

(Questioning by Mr. Lavine.)

Then after I received that word I went back to the jury room. I rapped on the door, as we usually do. They gave a rap from the inside. Then I opened the door and delivered the message as the judge had given it. I said, "The judge will read part or all of the instructions in open court, but not send the instruction to this room." The Foreman said to me "The instructions are not necessary." That is the remark he made to me.

(Questioning by the Court.)

Nothing else happened then. Nothing else on that subject. I closed the door and locked it. When I left the jury room, I left Mr. Brand at the jury room, with the door locked. He is another Bailiff; another Deputy United States Marshal. He was there when I returned.

(Testimony of Glenn C. Fuller.)

(Questioning by Mr. Lavine.)

I talked to the Foreman of the jury. His name I can't recall.

(Questioning by the Court.)

He was the same man that presented the verdict as the Foreman. The Foreman did all the talking.

(Questioning by Mr. Lavine.)

When he was talking the other jurors were all seated [311] around the table and he was at the end of the table.

His first conversation when he asked me to make the request, he was standing at the door, but when I returned, somebody else rapped, one of the other jurors rapped on the door, and when I rapped back and then opened the door the Foreman was sitting at the end of the table and I delivered the message to him—to the Foreman.

Mr. Lavine: At no time after that until the jury returned with the verdict, I think we have stipulated that the jurors were not brought into court.

Q. By Mr. Lavine: You did not bring the jurors into court at any time?

Mr. Neukom: It will be stipulated that they were not brought into court.

Mr. Lavine: All right; so stipulated.

Mr. Neukom: Wait a minute. I want the record to show, if you will stipulate: As a matter of physical condition, there is merely one door between

(Testimony of Glenn C. Fuller.)

here and the court chambers, and there is no intervening hall; and the defendant at all times during the conversations that took place in the judge's chambers that this gentleman has testified to was at all times right here in the court room.

Mr. Lavine: Well, I can't stipulate to that because I don't know whether he was in the court room at all times or not.

The Court: Well, you can ask him, can't you?

[312]

Mr. Lavine: Yes; I can ask him.

The Court: The defendant, whether he was here.

Mr. Lavine: (After consulting with defendant): He went out, he states, with Mr. Kettering, the Immigration Officer, and was outside a substantial portion——

The Defendant: About 10 minutes.

The Court: About 10 minutes of the time the jury was out?

Mr. Lavine: Yes; he was out, outside of the courtroom.

Mr. Neukom: He was in here in the building.

Mr. Lavine: I will stipulate that he was in the building.

The Court: In addition to what you have stated, there was no other communication from any member of the jury to you or to anyone else, as far as you know, from the time they left the court room until they returned with a verdict?

A. No other communication.

(Testimony of Glenn C. Fuller.)

Q. By Mr. Neukom: Did you discuss the case in any manner with the jury?

A. Not at all.

Q. By the Court: Or with the judge while the jury was out? A. Not at all.

DAVID BRAND

called as a witness herein, being first duly sworn, was examined and testified as follows: [313]

Examination

By the Court:

I am a Deputy United States Marshal, and Bailiff of this court. I was acting as such Friday, September 18th. I heard the testimony of Mr. Fuller just now. When he came downstairs he left me at the jury room. No member of the jury communicated with me in any manner whatsoever while I was there. I remained there at the door at all times from the time that Mr. Fuller left until his return. I heard his conversation and I heard his replies. They were as he testified.

Q. By Mr. Neukom: Did you talk to the jury?

A. No; I did not.

* * * * * *

Mr. Lavine: Now, may it please the Court, in this matter there is one common law which has been held repeatedly by the United States Supreme Court and by various Circuit Courts of Appeal, and that

is, that all proceedings, regardless of their nature, should be held in the presence of the defendant during the course of the trial from the time that the case begins until the jury actually comes in with its verdict. In the case of *Shields v. United States*, a decision by Chief Justice Taft in 1927, there was a request—— [314]

Mr. Neukom: Let us have the citation.

Mr. Lavine: 273 U. S. at page 583; 71 L. Ed. 787. There was a request in chambers, joined in by the District Attorney and counsel for the defendants in a criminal case, that the jury be held in deliberation until they should agree upon a verdict; and also there was a request for a further instruction and the jury retired and had received a written instruction from the Court; and Chief Justice Taft in that case states that all the proceedings should be held in the presence of a defendant. Here in that case, while the acts went much farther than we have in the case at bar, your Honor, still the Court pointed out there that in approval of an earlier case of the United States Supreme Court, *Fillippon v. Albion Vein Slate Co.*, 250 U. S. at page 76, which was a civil suit of damages in a personal injury action, that after the trial judge had completed his instructions to the jury and the jury had retired for deliberation, and while they were deliberating, they sent to the judge a written inquiry on the question of contributory negligence, to which the trial judge replied by sending a written instruction to the jury room, in the absence of the parties

and their counsel and without their consent, and without calling the jury into open court. A new trial was ordered. The Court said:

“Where a jury has retired to consider its verdict, and supplementary instructions are re-[315] quired, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instruction ought not to be sent to the jury without notice to counsel and an opportunity to object.”

That case going back to the case of——

The Court: Will you hand that book to me, Mr. Bailiff? That is Shields?

Mr. Lavine: Yes; Shields v. United States, your Honor.

(Court examining book.)

Mr. Lavine: Now, in the Fillippon v. Albion Vein Slate Co. case, the headnote which contains the summation of the case, the first headnote: “The Trial Court should not”——

Mr. Neukom: May it please your Honor, I would like to get these citations.

Mr. Lavine: Yes. I gave it to you before. 63 L. Ed. at 853.

The Court: That is the case referred to here.

Mr. Lavine: That is correct.

The Court: Fillippon v. Albion Vein Slate Co.

Mr. Lavine: “The Trial Court should not, in re-

sponse to an inquiry from the jury, send a written supplementary instruction to the jury room in the absence of the parties and their counsel, and without their consent, and without calling the jury in open court." [316]

Now, here we have a situation where the jury was not called into court after the request, the defendant was not present at the communication, and the proceedings were had in the absence of the defendant and not in open court.

In *Fina v. United States*, 46 Fed. (2d) at 643, it was stated that:

"Conduct of Trial Court in answering question propounded by jury after retirement, without notice to defendant or his counsel and in their absence, held error requiring reversal, so prejudice was not shown."

The Court: Mr. Lavine.

Mr. Lavine: Yes.

The Court: You do not need to argue the proposition to me that it is error it is error for a judge to instruct a jury in the absence of a defendant. And the cases that you have read all go to that.

Mr. Lavine: That is correct.

The Court: According to the first case you read the Court sent them a written instruction out of the presence of the defendant. Here this is merely a communication, which has been done a thousand times and done in every criminal case, as I indicated in my questions. The Marshal sends it to the judge in chambers, or wherever he may be. The communi-

cation comes from the jury to the judge that the jury has a verdict. Now, that is a communication from the jury to the judge. The judge sends the Marshal back to bring [317] them in. That is the communication from the judge to the jury.

Mr. Lavine: That is true, your Honor, but here the communication was not merely that. The communication was that they wanted the instructions read to them.

The Court: No; they did not want the instructions read.

Mr. Lavine: They wanted the instructions delivered to them.

The Court: No; there was no request that the instructions be read at all.

Mr. Lavine: There was a request that the instructions be delivered to them.

The Court: Yes; and my instruction was that I would read them in open court, which, of course, comprehended the presence of the defendant.

Mr. Lavine: However, when the jurors wanted those instructions, your Honor, under our practice in the State Court and under the Sections of State Court Proceedings—Section 1137 of the Penal Code and 27 Cal. App., in the case I cited on my motion for a new trial——

The Court: Yes; which holds it is a matter of discretion for the judge.

Mr. Lavine: No; not if the jury requests it. It is a matter of discretion with the judge unless the jury requests it, and I think that that is the language

of the case, [318] "Unless the jury requests it."

The Court: I do not read it the same as you do. It does not touch that. It just was that "It does not appear here that the jury asked for the instructions or for the privilege of taking them to the jury room." "The matter is one which it is contemplated shall be left to the sound discretion of the Court, whose action thereon will not be disturbed unless such discretion is shown to have been abused."

Mr. Lavine: Then, isn't there another sentence there?

The Court: No. It goes on: "It does not appear here that the jury asked for the instructions or for the privilege of taking them to the jury room." In other words, it does not indicate that you must send them if they ask for them.

Mr. Lavine: As I read one sentence in there, that was the implication of the case, your Honor, that if either side requested it, it was within the sound discretion of the Court, but that if the jury requested it——

The Court: This is quoting from the Cochran case:——

Mr. Lavine: That is correct, your Honor.

The Court: "It is not the absolute right of the prosecution or defense to have the papers or instructions sent with the jury, unless the jury demand it."

Mr. Lavine: That is right. [319]

The Court: That makes it a right of the person if the party demands it and the jury demands it.

Mr. Lavine: Well, in this case the jury demanded it and they were refused.

The Court: The testimony is not that the jury demanded it.

Mr. Lavine: They requested it.

The Court: They requested it, and when the Marshal went back, they said that they did not need them.

Mr. Lavine: After he told them that your Honor would not send them to them; that is correct.

Mr. Neukom: I do not think the State rule applies.

Mr. Lavine: What is that?

Mr. Neukom: I do not think the State rule applies.

Mr. Lavine: It does since the *Erie v. Tompkins*, I believe, if I understand the purport of that case. The State rule applies where there are no Federal decisions or holdings to the contrary, that the law of the State applies under the uniformity act.

Mr. Neukom: That is only diversity of citizenship in a civil case. I have that the rule that State law is inapplicable, as ruled in *Housel and Walser, Defending and Prosecuting Federal Criminal Cases*, under Section 519, citing a number of cases.

Mr. Lavine: I have read those, but I still think that Section 725 applies. I have made my point, your Honor. [320]

The Court: Very well. Let me see, now. On that point, your point is that it is not a matter of discretion with the judge?

Mr. Lavine: That is correct; it is not when the jury requests the instructions.

The Court: Yes.

Mr. Lavine: And first, that it is not a matter of discretion with the judge; and second, that even if it were a matter of discretion with the judge, that that discretion would have to be exercised by a proceeding in open court in the presence of the defendant; in other words, after the request was made to you.

The Court: That is, a request for all of the instructions to take to the jury room, we are talking about?

Mr. Lavine: That is correct, yes.

The Court: Very well.

Mr. Lavine: And then, that the jurors should have been called back into the court, the defendant should have been called back, and both sides be heard on the question of whether they should be sent or given to the jury to pick out. At least, the defendant should have been present at that stage of the proceedings with his counsel, and a proceeding held in open court in which all the proceedings were fully presented and heard on both sides. Then if your Honor had ruled, that would have been an exercise of discretion. But where your Honor has not done that, there is no exercise [321] of discretion but an action without a discretion on that matter.

Mr. Neukom: May I inquire, your Honor, of Mr. Lavine, if he requested the Court that his client be brought into chambers or that the Court be reconvened?

The Court: There is no testimony to that effect.

Mr. Neukom: You do not contend that that is so, do you Mr. Lavine?

Mr. Lavine: No.

* * * * *

Mr. Lavine: The second ground, your Honor, of the motion for the new trial is an instruction that your Honor gave that the defendant could be guilty if he aided and abetted, advised and encouraged any act of prostitution or act of transporting and causing transportation in interstate commerce. Does your Honor recall?

The Court: You are referring specifically to the instructions quoting the law?

Mr. Lavine: Yes, your Honor.

* * * * *

Mr. Lavine: The other point is one raised prior to [322] the time your Honor came into the case, and that is the question of the jurisdiction of this Court to proceed. I am not going to argue that at length on account of the position in which the defendant finds himself at the time of his arrest, at the time of this entire case, and at the time of the entire proceedings.

The Court: Well, I passed on that at the commencement of the trial.

Mr. Lavine: That is right.

The Court: That is to say, whether or not he was then entitled to go to trial or had been denied due process.

Mr. Lavine: That is right.

The Court: And my holding then was that he

had had a reasonable opportunity to seek counsel and prepare his case for trial; that he had not been denied his right of due process.

Mr. Lavine: Under the jurisdiction of a court procedure, if this defendant is a prisoner of war, your Honor held the other day that he was being held under martial law. Of course, we are now engaged in total war and if he is held by reason of being a prisoner of war, then his only right to proceed, or the only right of the court to proceed, would be to notify a neutral nation who had to be notified and be present in court during the trial of this defendant.

The Court: Who? Who present in court?

Mr. Lavine: A neutral nation, if the defendant is a [323] prisoner of war.

The Court: A representative of a neutral nation?

Mr. Lavine: Yes, your Honor, if the defendant is held to be a prisoner of war. Of course, that is something that we have argued heretofore, and under War Articles of The Hague Treaty that is one of the requirements. Now, that is my position generally, your Honor.

There are several other points and several other instructions. We have considered all those in due time and I am not going to take up—

The Court: State all your points. Have you stated them all on your motion for a new trial?

Mr. Lavine: On the point of the question of intent, your Honor, on the instructions I disagreed with your Honor's introduction or permission for

the Government to introduce in evidence the acts of misconduct, so called, of the defendant.

The Court: I recall, on the question of intent.

Mr. Lavine: On the question of intent.

The Court: I settled that, and I think my decision was correct.

Mr. Lavine: You asked me to state my points and I am presenting that to the Court.

The Court: Very well.

Mr. Lavine: I think that the defendant could not have a fair trial under the situation in which he found himself, [324] with the two Immigration Officers in the court all the time and he being a prisoner under the shadow of those Immigration Officers and being of Italian lineage. I don't think that that situation is one that lent itself to a fair and impartial trial on the part of this defendant.

* * * * *

The Court: Let us have this correct now for the record. You are willing to stipulate that at no time has the defendant been handcuffed, manacled, or physically restrained or imprisoned or bound or handcuffed to anything during this trial?

Mr. Lavine: Not in the court room; no, your Honor.

The Court: Very well.

Mr. Lavine: However, he has been right with an Immigration Officer at all times and that——

The Court: That is to say—and let us have that correct as a matter of record—the Immigration Officer has not been seated at the counsel table?

Mr. Lavine: That is correct.

The Court: You have been seated alone?

Mr. Lavine: That is right.

The Court: And he has been seated at least from 10 to 15 feet away?

Mr. Lavine: That is correct, in the court room.
[325]

The Court: Is it your contention that the Immigration Officer was within the hearing of yourself and your client during the course of this trial.

Mr. Lavine: I can't say that he was, your Honor.

Mr. Neukom: Let us put him on the stand on that, then, your Honor. Put the Immigration Officer on.

The Court: All right; come forward.

Mr. Lavine: We can stipulate that he has been in a uniform all the time?

Mr. Neukom: Yes. Yes; he has.

JOSEPH SLOANE KETTERING

called as a witness herein, being first duly sworn, was examined and testified as follows:

Examination

The Court: Is it also stipulated that he has a uniform on and at all times has carried a gun?

Mr. Neukom: Also so stipulated.

Mr. Lavine: So stipulated.

By Mr. Neukom:

I am wearing the uniform that is designated by my superiors, as a Border Patrolman of the Immi-

(Testimony of Joseph Sloane Kettering.)

gration Service. It is true that during the trial I took Mr. Di Marzo down to Mr. Lavine's office on one day and allowed him to be there for as long as they wanted to talk to him. It is true that afterwards you told me that you did not want to know a single thing as to what took place down there. [326] I did not at any time communicate with you or any F. B. I. agent concerning anything that I had even heard of talked about to Mr. Di Marzo. I was present at some time at the Tuna Canyon Detention Station, where Mr. Di Marzo was located, when Mr. Lavine came out and interviewed him. I did not listen to any of the conversation. I did not hear it. As to whether it was in a room where they were given free access to talk over whatever they wanted to talk about—— On the first occasion I believe it was in the admission office in a small room. On the second occasion it was under the tree in the yard in the enclosure. On the first occasion I was not present at the discussion. I was merely in and out of the office. On the second occasion I was not present there and merely observed them under the tree, under the observation of the officer of the watch who was, I would say, about 20 or 25 feet from the tree where they were seated under. I couldn't say whether Mr. Lavine came out on more than those two occasions. I was given instructions by my superiors permitting Mr. Lavine to come at any reasonable time to interview Mr. Di Marzo. To the best of my knowledge those instructions were carried out.

(Testimony of Joseph Sloane Kettering.)

This La Tuna Camp is upon a highway and it is accessible from automobiles. It is approximately 15 miles from here.

(Questioning by the Court.)

I have been present in the court room during the course of this trial. I have observed the defendant seated at the [327] counsel table with his counsel. I have not overheard any of their conversations or consultations, or the client's instructions to his lawyer, or the lawyer's advice to his client in the court room.

Cross Examination

By Mr. Lavine:

At the time that you went out to the Tuna Canyon Station there were other officers there who were in charge, and they were the ones who were assigned to watch Mr. Di Marzo and any person interviewing him. This small room that I saw you talking in there, I would say it was a room 6 by 10 feet. There is a screen in the room. The persons talking are visible through that screen from the admission office. Whether you can hear conversations in the admission office from the room where the screen is located would depend on the audibility of the conversation, how loud it were spoken or how soft it were spoken. I could carry on a conversation there that could not be heard, and I could carry on conversation that could be heard.

At some of the times that I have been in the court room here I have also been accompanied at other

(Testimony of Joseph Sloane Kettering.)
times with an Immigration Officer in a similar uniform to my own. On two occasions. One carried a gun and one did not.

When I was in your office on the occasion that I brought Mr. Di Marzo down, on that occasion I was in the office itself where Mr. Di Marzo was conferring with you. [328] I remained present at all times in the room.

Q. By Mr. Neukom: You were complying with your duties, were you not? A. Yes, sir.

Mr. Lavine: Well, there is no question about that, and he was doing it very efficiently, probably too efficiently, from our standpoint.

The Court: You have stated all the points upon which you rely?

Mr. Lavine: Yes; upon the motion for the new trial.

The Court: Yes.

Mr. Lavine: Referring to Article 60 of the Convention of The Hague, your Honor, at the opening of a judicial proceeding directed against——

The Court: Just a moment. May I have the file? You quoted that, did you not, previously?

Mr. Lavine: I don't believe that I did, your Honor.

Mr. Neukom: The Government did in their brief, your Honor.

Mr. Lavine: What is that?

Mr. Neukom: The Government has in their brief quoted portions from the Article.

(Testimony of Joseph Sloane Kettering.)

The Court: All right; proceed.

Mr. Lavine: "At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting [329] power thereof as soon as possible and always before the date set for the opening of the trial. This advice shall contain the following information:"

And then it sets up various information that should be set up, including a specification of the count or counts of the indictment, giving the legal provisions applicable.

"If it is not possible to mention in that advice the Court which will pass upon the matter, or date of opening the trial and the place where it will take place, this information must be furnished to the representative of the protecting power later and as soon as possible, and in all events, at least three weeks before the opening of the trial."

My client asked me to call that provision to your Honor's attention in connection with this matter.

I believe I have stated all the grounds that I wish to urge at this time, your Honor.

The Court: Well, wait a minute. That is in support of your contention that he is a prisoner of war, or in support of your contention that he is an alien, merely an alien?

Mr. Lavine: That is in support of my position that he is a prisoner of war, your Honor; that he could not be held except by a Presidential order;

that as far as the charge on which he is being detained at the Tuna Canyon Station is concerned, that that is not by reason of any indictment or any offense, but only by reason of his being an alien, as a [330] prisoner of war, that is, he was taken into custody.

The Court: All right. Now, the Article that you just read, is it your contention that relates to prisoners of war?

Mr. Lavine: Yes, your Honor; and that this man——

The Court: What is that? That is a convention of what date?

Mr. Lavine: Signed at Geneva July 27, 1929.

The Court: Read it again, the section.

Mr. Lavine: Ratified in 1932.

“At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible and always before the date set for the opening of the trial.”

The Court: Who is the detaining power?

Mr. Lavine: The detaining power is the United States.

The Court: Who is the protecting power?

Mr. Lavine: The Swiss Consul would be the protecting power under the——

The Court: Is that designated there?

Mr. Lavine: It is designated somewhere in the Treaty itself, your Honor, in another portion of it. I am not sure what section designates that, your

Honor. I believe there is a section in here designating that, if there is no repre- [331] sentative of the foreign government, the Swiss government then acts as the protecting power for those countries which have no representative in the United States.

The Court: It is necessary, first, to determine that he is a prisoner of war.

Mr. Lavine: That is correct, your Honor.

The Court: In order for that to become effective. How do you get around the authorities cited by the Government in their brief that such interned alien enemies are not, and have not been since July, 1798, prisoners of war?

Mr. Lavine: I cited the determination of the Army in this war in one of their bulletins that interned aliens are regarded as prisoners of war.

The Court: Well, let me see if I can find that.

Mr. Lavine: Army Bulletin No. 11, I believe it is, for 1941.

Mr. Neukom: I have that bulletin upstairs. If I had had any idea you were going to argue this again I would have brought it down. But that, your Honor, is purely an inter-office bulletin from the War Department to itself.

The Court: From the War Department to itself?

Mr. Neukom: That is to say, it is an office bulletin.

The Court: Well, if it is an official conclusion——

Mr. Neukom: It is not an act of law. I would prefer having the bulletin and discussing it. I think the matter is entirely treated by the Hague Treaty. To be a prisoner [332] of war you must be a captured person.

The Court: I am inclined to think that is correct. All right.

Mr. Lavine: Your Honor, if the Administrative Branch of our Government, which deals with war, has declared that persons so interned are prisoners of war isn't it determinative of the matter?

The Court: You were just arguing that the treaties, international treaties, were the supreme law of the land.

Mr. Lavine: That's correct.

The Court: And prevailed over the declaration of any department of the Government.

Mr. Lavine: That's correct.

The Court: Now, upon which do you wish to rely?

Mr. Lavine: On both, your Honor.

The Court: On both.

Mr. Lavine: The Treaty itself does not in any way differentiate that. The Treaty says, "Prisoners of war." We have no definition in the Treaty—

The Court: Of what a prisoner of war is.

Mr. Lavine: Excludes it. The definition given by the Army says that anyone that is taken into custody certainly would be a prisoner of war; and anyone who under certain conditions is doing certain things that are deemed inimicable to the Government are certainly prisoners of war.

The Court: Does that say that there? [333]

Mr. Lavine: No, your Honor, I haven't that here.

The Court: Well, in a strict sense isn't a prisoner of war a person who has been captured in the act of making war upon the United States?

Mr. Lavine: I didn't get your Honor's last statement.

The Court: In a strict sense, or in a common sense, isn't a prisoner of war a person who has been captured in the act of making war upon the United States?

Mr. Lavine: No, your Honor. That would be a very limited definition of it. A prisoner of war would be any person who is being held by the Government for the purpose and because of the fact that they might or might not be a possible part and parcel of the Army of the enemy. The defendant is being held by the Army.

The Court: Part and parcel of the Army of the enemy making war, if the nations are at war.

* * * * *

The Court: I want to give your point a little study on that one and also on your first point.

* * * * *

Mr. Lavine: And I have made another motion in writing. [334]

The Court: Where is that motion?

Mr. Lavine: Motion in arrest of judgment.

The Court: Simply make that motion on all the other grounds that you urged in connection with the new trial.

Mr. Lavine: Very well, your Honor. [335]

* * * * *

The Clerk: United States of America v. Joseph Di Marzo, for decision on motions of the defendant for a new trial and in an arrest of judgment, and for sentence.

Mr. Lavine: Before your Honor makes his ruling, I wonder if I could call Mr. Kettering back for a few questions to clarify a few things I omitted asking him when he was on the stand?

* * * * *

Mr. Lavine: In support of the point that the Court is without jurisdiction, on account of The Hague Treaty, and on account of the fact that the defendant was confined in a detention camp. And I just wanted him to describe a little more fully what Mr. Neukom had asked him about, and I didn't know some of the facts regarding it at the time.

JOSEPH SLOANE KETTERING

recalled as a witness herein, being first previously duly sworn, was examined and testified as follows:

* * * * *

[336]

Mr. Lavine: Also, I would like to introduce two pictures of Mr. Kettering as he appeared here in court. I have shown them to Mr. Neukom.

Mr. Neukom: I don't feel that they have any place in the record, but I have no serious opposition to them.

The Court: Hand them to me, Mr. Clerk.

Mr. Lavine: They are the appearance of the officer who had charge——

The Court: These haven't any place in the record.

Mr. Lavine: I offer them for whatever purpose there is, to show the fact that Mr. Kettering was in

(Testimony of Joseph Sloane Kettering)

uniform, with the defendant, and the appearance he had at the time he was at all times in the court room. The one of Mr. Kettering is all I am interested in, your Honor.

The Court: The picture, as he is standing here this time, will give a wrong impression.

Mr. Lavine: I want the appearance of Mr. Kettering as he appeared at all times in the court room. We can cut off the other picture.

The Court: He didn't have his hat on in the court room, I know that.

Mr. Lavine: Except for the hat, your Honor, I think that is an exact representation of Mr. Kettering as he was dressed.

Mr. Neukom: That is the custom down in Georgia, for the Bailiffs to wear their hats, but not here. I don't think [337] they have any materiality

The Court: I don't think they have any materiality at all.

Mr. Lavine: It would simply show, your Honor, his appearance in court as was described, and as the jury saw him, at all times, with the exception for the fact that he has a hat on in that one picture there.

The Court: Well, it is wholly immaterial, it is entirely misleading. If you had a picture here of the size of the court room and Mr. Kettering sitting back there about 25 feet away from the defendant, it would be more appropriate.

I will refuse to admit them.

Mr. Lavine: Exception noted.

(Testimony of Joseph Sloane Kettering)

Direct Examination

By Mr. Lavine:

At different times as I am now dressed, and at the time that the case was actually in progress I had occasion to take the defendant into the lavatory in this building. During those occasions we ran into persons who were jurors, who were sitting in the case that I was called in. On one occasion there was a juror in there, that I recognized as a juror. I was dressed as I am now, with my uniform and with the Sam Browne belt, and with shells in my belt, and my pistol on my side.

The Court: Was anything said to the defendant by you, or by the juror, while you were in the lavatory? [338]

The Witness: I think I said, "Good morning, sir." and he said, "Good morning."

The Court: To the juror?

The Witness: Yes.

The Court: Nothing else?

The Witness: Nothing, to my knowledge.

The Court: Nothing in the hearing or presence of the juror?

The Witness: No, sir.

Mr. Neukom: That was not after the jury had retired to deliberate?

The Witness: No, sir.

By Mr. Lavine: That was while the case was in progress?

(Testimony of Joseph Sloane Kettering)

By the Witness:

Yes sir. The Tuna Canyon Station has a wire fence around it, and has barb wire on top of the wire fence. It is locked, and all persons who are confined therein are locked in. The place is guarded. We have police dogs guarding the place, as well as men.

As to whether this room where you conferred with Mr. DiMarzo is electrically wired—there is an amplifying system in four positions in the camp that are for the use of the personnel, to facilitate having to run back and forth.

As to whether that amplification carries any sound or voices in that room to other places in the camp—it is controlled from the office, and if the amplifying system is [339] open there are five spots from the camp that can call the office, and any conversation in that room at that time would be heard in the office. By turning on the amplification system any normal conversation in that room can be heard in the main office. There are Italians, Germans and Japanese in that camp.

Q. And when they are taken from there for internment, who takes them?

Mr. Neukom: I object to that as being immaterial to the issues in this case.

The Court: Sustained.

Q. By Mr. Lavine: Does the Army take them?

Mr. Neukom: I object to that.

The Court: Sustained.

Mr. Lavine: Exception noted to the questions.

(Testimony of Joseph Sloane Kettering)

I offer to prove, at this time, that the Army officers would take them from the internment—from this station to an internment place, and that they are at all times from that time on controlled by the United States Army.

I make that offer of proof.

Cross Examination

By Mr. Neukom:

The purpose of these amplifications is if at any time anybody in the main office wants to convey a message to this large camp, they have an opportunity to convey it over the loudspeaker system. And if anyone happens to be at any one [340] of the five points in the camp, and wants to convey a message to the office, they may be able to convey one. That is to say, anyone in my capacity, or anyone else—so that you may keep at hand, and be able to quickly communicate, if there is any trouble brewing in the camp.

Mr. Di Marzo is captain of the camp, and I will say is an aide and advisor to some of the fellows that can't speak good English, and so forth; he helps them out. They live in barracks. He had free access to all parts of the camp during the day.

Q. In fact, you have seen ladies come there and visit with him, have you not?

Mr. Lavine: I object to it as irrelevant and incompetent.

The Court: Overruled.

Q. By Mr. Neukom: You have seen ladies come there and visit with him?

A. Yes, sir.

(Testimony of Joseph Sloane Kettering)

Mr. Lavine: Exception.

Q. By Mr. Neukom: Constantly, that is from day to day?

Mr. Lavine: Same objection.

The Court: Overruled.

Mr. Lavine: Exception.

A. Not every day, but on various occasions.

By the Witness:

They were permitted to come and talk to him. [341]

With regard to the amplifier—that was not in the nature of a Dictaphone. To my knowledge there are no Dictaphones in any of the rooms there that counsel was permitted to talk to Mr. Di Marzo while he was preparing his case. The particular room in which counsel was allowed to interrogate Mr. Di Marzo, or confer with him was a room about 6 by 8—possibly a third as big as the jury box. A very small room. He was also privileged to speak to him out under one of the trees in the yard, upon occasion. There was nothing to have prevented him to have gone out there and spoken that I know of. As to whether they picked the room where they talked just because this was more convenient to talk in—as to that I couldn't say whether they picked it of their wishes, or whether they were told to go in there. Mr. Di Marzo was not manacled when he was brought in to speak to Mr. Lavine. He was permitted to talk, but I don't know whether he was given pencil and paper. I have seen him conferring with Mr. Lavine on one or two occasions. I really couldn't say for how long. I have

(Testimony of Joseph Sloane Kettering)

not observed anyone out at the camp interrupt their conversations and tell Mr. Lavine that he must leave now. Mr. Lavine was privileged to remain there so far as I observed, as long as he thought it was necessary, upon each occasion when he went out to the place.

Redirect Examination

By Mr. Lavine: [342]

This loud speaker system is completely amplified to various points so that it is, in effect, a Dictaphone. That is to say, all the voices register in the main office, in normal tone of conversation.

(Questioning by the Court.)

I was not in the room with Di Marzo when he was consulting with Mr. Lavine. I was never in the room at any time. I never have been present at all times during any of Mr. Lavine's and Mr. Di Marzo's—I have been in and out.

That room sets off a little hallway, which is the admission to the admission room, where the administrative functions of the camp are handled, and it was some of my duties out there—I am in and out many times a day, and I have been in and out during two occasions when Mr. Lavine and Mr. Di Marzo were present. Upon those occasions I did not hear anything that was said either by Mr. Di Marzo to Mr. Lavine, or by Mr. Lavine to Mr. Di Marzo, that I recall. I don't know how long Mr. Di Marzo has been a captain in the camp. I have been there since the

(Testimony of Joseph Sloane Kettering)

27th of June, and he was a captain when I came there. He was a captain in the camp at the time that Mr. Lavine consulted with him; that is, when he saw him.

The loudspeaker system is controlled from the guard office, and if the system were open, he could come up and say anything that would come to his mind; if it were closed, the only way that he could contact the guard office would be [343] to get up into the guard post and push the button, which notifies the guard that someone wants to communicate with him, and then he turns on the speaker system.

As to whether as a captain out there it is included among the captain's functions to communicate with the central office over a communicating system—sometimes he is called, or someone else is called, and he hollers back that they are doing, or something, and we can hear that in the office. I have heard Mr. Di Marzo holler back over the loudspeaker system.

(Questioning by Mr. Neukom.)

The communication system in the room isn't hidden.

(Questioning by the Court.)

It is a box about six inches square and about two inches deep. It looks just like a small radio speaker.

Recross Examination

By Mr. Neukom:

It is on the wall. It sets on top of a filing case in the administration office. It was readily observable. I think it was in the month of August of this year.

(Testimony of Joseph Sloane Kettering)

I did not ever hear Mr. Lavine, or Mr. Di Marzo make any complaint, because of the existence of that box there, either before an interview or after an interview had with Mr. Di Marzo to my knowledge.

I have not communicated anything that Mr. Di Marzo has said to me either in the presence of Mr. Lavine, or in his [344] absence to you or to any agent of the F. B. I., with regard to this case.

I have been instructed by you and by Mr. Tyler that you did not care to know anything about what might take place out in the camp, so far as information was concerned.

Redirect Examination

By Mr. Lavine:

There is another officer who sits there in observation and at the listening post of this loud speaker. He sits approximately 40 feet, 50 feet from this room, where you visited Mr. Di Marzo. He sits in the control of the loud speaker. He controls it. He can turn it on and off whenever he wishes. I have not been present at all times when he has been there, but I have just walked in and out of the different places.

The Court: What do you think you have established by this testimony?

Mr. Lavine: I simply have completed the record, your Honor, in connection with the fact that where a person is in the position of this defendant he is not in the same category as one who is not confined in a camp of that sort. While it is true that we were able to confer, whether we conferred privately or not is

(Testimony of Joseph Sloane Kettering)

not one of those things that we could be certain of. And he didn't have the same freedom of movement that other persons not similarly situated could have. In other words, if he was not under this internment, [345] your Honor, he was entitled to be released on bail. The Constitution of the United States guarantees that. He posted his bail. This defendant had his bail up, and he was ready to go out on bail, which gave him, and would have given him, the freedom of opportunity of finding witnesses, that he could not tell me about, or that I couldn't possibly have known or located, through that news that might have been available to him.

The Court: I am speaking now of the testimony this morning.

Mr. Lavine: I say by reason of his confinement in the position he was in he did not have the same effective right of consultation with counsel.

The Court: No. I am speaking now—is it your position that because of the mechanical facilities which have been described this morning you claim some particular prejudice other than the general cumulation to the prejudice which you claim your client has had?

Mr. Lavine: Only that he could not effectively prepare for trial as one otherwise situated. That is the general prejudice which I have asserted heretofore, your Honor. And it is along the same line that I have asserted heretofore. That was the purpose of bringing those additional facts out.

The Court: I think it is a matter of showing an

actual prejudice, a prejudice in fact; it isn't a situation where suspicion might arise that there could be some prejudice. [346]

Up to now there has been no showing of any actual prejudice against this defendant, of any actual inability to consult with his counsel, of any actual lack of privacy. There has been no showing here that the defendant did not know of the existence of this. There is, certainly, an inference, from the officer's testimony, that he should have known, and could have known, and did know, in fact, of the existence of this, and yet he proceeded to consult—under the statements of counsel, concerning which a stipulation was had, that he would testify, if he were put on the witness stand—eight times with this defendant here.

Mr. Neukom: At the camp.

The Court: Yes, at the camp.

Whatever prejudice occurred to this defendant in that connection, it seems to me it was no more than the psychological prejudice that would occur against anybody who has been arrested and is committed to any institution.

I believe that the test is whether or not there is any showing of actual prejudice. There isn't any.

Mr. Lavine: Exception.

The Court: Have you anything further to offer in connection with your motions for a new trial?

Mr. Lavine: Nothing further.

The Court: On the two matters that I indicated I would give some consideration to, the two points, when you argued the matter before, those two points were— [347]

1. Whether or not there was a private communication with the jury in the act of the deputy marshal conveying a message from the jury to the Judge in chambers, and the Judge's return back, on the requesting of instructions and the Judge's denial of this. And

2. Whether or not by virtue of his confinement in custody of the immigration authorities during the process of preparing for trial, that is his actual custody by the immigration authorities during the trial, it has made him a prisoner of war, and entitled him to a notification by the Government to the so-called protecting power or third power prior to the time of the trial, as provided in the Hague Convention as signed at Geneva on July 27, 1929. And whether or not he has been denied due process of law, actually, by virtue of his commitment or as a matter of law.

* * * * *

I will have to hold against the defendant on that first ground.

Mr. Lavine: Exception noted.

The Court: Coming to the last ground, the third one, whether or not there was a denial of due process; that is, as a matter of law, or as a matter of fact.

As I indicated a few moments ago, there has been

no showing here; in fact, no attempted showing, of any actual [348] prejudice, or inability on the part of the defendant to properly prepare his case, or defendant's counsel. Defendant relies, apparently, solely, as a matter of law, upon his confinement as denying him due process.

I think there must be a showing of actual prejudice, and there being none, I will have to hold against the defendant on that, the third count.

Mr. Lavine: Exception to that, too, your Honor.

* * * * *

Going now to the other point, which I have designated Second, your contention that he is actually a prisoner of war, and under the requirement of Article 60, Chapter 3, Section 4 of the Convention between the United States of America and other Powers, signed at Geneva July 27, 1929, by the terms of which it is required: "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial," and other matters. It seems to me that that question is determined solely by whether or not this defendant is a prisoner of war, under the terms of this treaty.

* * * * *

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Taking all of those things, and reading them together, it seems quite evident to me that this treaty does not and was not intended to apply to persons

in the position of the defendant, and, therefore, I will hold against you on that point.

Mr. Lavine: Exception noted.

* * * * *

The Court: The motion for a new trial is denied.

Mr. Lavine: Exception.

The Court: Your motion in an arrest of judgment, have you anything further to offer in connection with that?

Mr. Lavine: The same grounds as offered for the motion for a new trial, and the lack of the jurisdiction of the court.

The Court: That is denied.

Have you anything else to offer before the Court pronounces sentence?

* * * * *

The Government has no recommendation either for or against whatever should be done in connection with this defendant. [350]

* * * * *

The Court: Mr. Joseph Di Marzo, do you know of any legal reason why you should not be sentenced?

The Defendant: No.

Mr. Lavine: Other than the reasons which have been set forth in our motions.

The Court: Which have been settled and been acted upon by this Court?

Mr. Lavine: Yes; and exceptions duly noted to all of them.

The Court: Very well.

* * * * *

It will be the judgment and sentence of this Court that you complete the time in a penitentiary of the United States, to be chosen by the Attorney General, for the term of three years, and in addition to that, that you be fined the sum of \$1,000.

Mr. Lavine: Exception noted. [351]

Defendant requested the following instructions which were refused and exceptions duly taken:

DEFENDANT'S INSTRUCTION No. A

You are instructed that the testimony of a witness who admits that she has told falsehoods *would* be subjected to careful scrutiny and considered with great caution, and you may reject it.

Speiller v. United States, 31 Fed. (2d) 682

DEFENDANT'S INSTRUCTION No. 1

You are instructed that the defendant is charged in the indictment with violation of that portion of United States Codes Annotated reading as follows:

“Any person who shall knowingly transport or cause to be transported in interstate commerce any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, shall be deemed guilty of a felony.”

It is your duty to find whether the defendant in this action knowingly transported or caused Helen Merle Beverlin to be transported in interstate com-

merce for the purpose of prostitution or debauchery or for any other immoral purpose, from Los Angeles to Hawaii. It is incumbent upon the Government to prove that charge and each element thereof beyond a reasonable doubt. [352]

DEFENDANT'S INSTRUCTION No. 4

You are instructed that when a witness testifies her character for truth, honesty and integrity is immediately placed in issue in the case, and if her character is bad you have a right to disregard the whole of her testimony. The weight to be given to the testimony of any witness is for you to determine.

DEFENDANT'S INSTRUCTION No. 6

You are instructed that one of the material elements of the offense to be proved by the Government is the specific intent on the part of the defendant to commit the act charged. The law does not presume such specific intent or purpose, but it is a fact to be proved by the Government, the same as any other fact in the case, and such intent cannot be presumed but must be established beyond a reasonable doubt.

If the Government fails to prove such specific intent beyond a reasonable doubt, or if such lack of intent appears from the nature of the evidence, you must acquit the defendant. The acts and circumstances surrounding the particular events of January 24, 1941, may tend to establish such in-

tent or lack of intent, as, for example: Did the defendant buy the ticket with which Helen Merle Beverlin departed? If he did not, then that fact would be evidence tending to establish the defendant's innocence. Did the defendant take Helen Merle Beverlin or accompany her to the boat? If he did, then that fact might be evidence [353] tending to establish intent to cause her to leave the United States. If he did not, then that fact would tend to show he was not causing her to leave the United States.

And so you may take into consideration each and all of the circumstances of the case in determining whether the defendant transported or caused Helen Merle Beverlin to be transported for the purposes condemned by the statute. If you have a reasonable doubt as to whether the Government has established such intent and purposes or knowledge on his part, you must acquit the defendant.

DEFENDANT'S INSTRUCTION No. 7

You are instructed that you have a right to take into consideration the action of the Government in acquitting and virtually granting immunity to Helen Merle Beverlin as bearing upon her credibility, her motive for false accusations, as well as bias and prejudice in the case. You also have the duty to take into consideration any other motive of prejudice or bias that may motivate her testimony against the defendant in this case.

People v. Pantages, 212 Cal. 237 [354]

DEFENDANT'S INSTRUCTION No. 8

You are instructed that where all of the substantial evidence is as consistent with innocence as with guilt a conviction cannot be sustained. A defendant in a criminal action is presumed to be innocent, and that presumption clothes him throughout the trial of the case, and unless it is overcome by substantial evidence that satisfies your minds beyond a reasonable doubt, you must acquit the defendant.

Turinetti v. United States, 2 Fed. (2d) 15

Grantello v. United States, 3 Fed. (2d)

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Edwards v. United States, 7 Fed. (2d) 357

Bishop v. United States, 16 Fed. (2d) 410

Dickerson v. United States, 18 Fed. (2d)

887

Van Gorder v. United States, 21 Fed. (2d)

939

Salinger v. United States, 23 Fed. (2d) 48

Gerson v. United States, 25 Fed. (2d) 49

Philyaw v. United States, 29 Fed. (2d) 225

Gold v. United States, 36 Fed. (2d) 32, 33

DEFENDANT'S INSTRUCTION No. 9

You are instructed that where the evidence in a criminal case is circumstantial it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The defendant is presumed to be innocent until the proof satisfies the jury beyond a reasonable [355]

doubt of his guilt. Where the evidence is circumstantial, before the circumstances are sufficient to satisfy the minds of the jurors beyond a reasonable doubt, where every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and in that event it would be your duty to find the defendant not guilty.

People v. Lamson, 1 Cal. (2d) 648, 662

DEFENDANT'S INSTRUCTION No. 10

You are instructed that a woman may be an accomplice to her own transportation where she actively participates in bringing about the same. This is a fact for you to determine, and if you determine that she is an accomplice you may view her testimony with caution and distrust and disregard the whole of her testimony if you so desire.

United States v. Holte, 236 U. S. 140, 59
L.Ed. 504

DEFENDANT'S INSTRUCTION No. 11

You are instructed that before the defendant can be convicted it is incumbent upon the Government to establish guilty knowledge on the part of the defendant. [356]

DEFENDANT'S INSTRUCTION No. 13

If you find that Helen Merle Beverlin would have taken the trip in question in any event and regardless of whether she engaged in prostitution, if she did so engage in Hawaii, this does not bring

the case within the meaning and intent of the statute; and if you find that Helen Merle Beverlin intended to take the trip herself in any event, you must acquit the defendant.

Fisher v. United States, 266 Fed. 667

DEFENDANT'S INSTRUCTION No. 14

You are instructed that where a person is wilfully false as to a material matter you may disregard the whole of her testimony, and if you find that Helen Merle Beverlin wilfully falsified in any material matter and you disregarded the whole of her testimony, you must acquit the defendant Joseph Di Marzo.

DEFENDANT'S INSTRUCTION No. 15

You are instructed that in determining whether Helen Merle Beverlin was alone responsible for her transportation to the Hawaiian Islands you must consider whether she herself bought the ticket, she herself planned the trip, she herself was active in desiring to go and in arranging her [357] own place of abode and mode of living, and if you find from the evidence that she did these things herself you may draw from these facts inferences favorable to the defendant, and if they in themselves, or in conjunction with other evidence leave your minds in a state of reasonable doubt as to his guilt, you must acquit him.

United States v. Grace, 73 Fed. (2d) 294

Gebardi v. United States, 77 L.Ed. 206

DEFENDANT'S INSTRUCTION No. 16

You are instructed that even if you find from the evidence that Helen Merle Beverlin engaged in prostitution in Hawaii, it would be no proof that the defendant knowingly transported her or caused her to be transported for that purpose. It is incumbent upon the Government to prove by positive evidence that at the time Helen Merle Beverlin left Los Angeles the defendant knowingly transported or caused her to be transported for that purpose, and evidence of any acts of immorality by Helen Merle Beverlin in Hawaii must be directly shown to have been caused by the defendant, or it must not be considered by you.

United States v. Grace, 73 Fed. (2d) 294

Gebardi v. United States, 77 L.Ed. 206

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DEFENDANT'S INSTRUCTION No. 17

You are instructed that before you can convict Joseph Di Marzo it is incumbent upon the Government to prove that he knowingly transported or caused Helen Merle Beverlin to be transported for the specific purpose of prostitution or debauchery, or for any other immoral purpose, and in this respect I charge you that even if you find from the evidence that Joseph Di Marzo gave Helen Merle Beverlin some money before she left this would be insufficient to establish the charge here. The gravamen of the charge is the transporting or causing to be transported for the purpose of prostitu-

tion, and unless it is shown that Helen Merle Beverlin was transported or caused to be transported for the specific purpose contained in the statute, the defendant would be not guilty.

United States v. Grace, 73 Fed. (2d) 294

Gebardi v. United States, 77 L.Ed. 206

DEFENDANT'S INSTRUCTION No. 18

You are instructed that even though Helen Merle Beverlin went to the Hawaiian Islands and engaged in prostitution, if she did so engage, you must still acquit the defendant if the evidence leaves in your minds a reasonable doubt as to whether the defendant knew that she was going to the Hawaiian Islands for that purpose and with that intent.

Fisher v. United States, 266 Fed. 667

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DEFENDANT'S INSTRUCTION No. 21

If the Government has failed to prove that the defendant knowingly transported or caused Helen Merle Beverlin to be transported in interstate commerce for the specific purpose of prostitution or debauchery, or for any other immoral purpose, you must acquit him.

DEFENDANT'S INSTRUCTION No. 22

You are instructed that the offense charged in the indictment is knowingly transporting or causing one Helen Merle Beverlin to be transported from Los Angeles, California, to the Hawaiian Islands for the purpose of prostitution, or other im-

moral purposes. It is incumbent for the Government to prove beyond a reasonable doubt the following essential elements to the charge: (1) That Joseph De Marzo knowingly transported, or (2) knowingly caused Helen Merle Beverlin to be transported (3) for the purpose of prostitution or debauchery, or (4) for any other immoral purpose.

DEFENDANT'S INSTRUCTION No. 23

You are instructed that you have a right and a duty to take into consideration the motives which actuated a witness in testifying, and if you find from the evidence that Helen Merle Beverlin had quarreled with the defendant and [360] that she had gone to the Hawaiian Islands against his wishes, and that after returning she had fought with him, you may take these facts into consideration in determining the weight to be given to the testimony of Helen Merle Beverlin, and if, in your opinion it is not entitled to any weight, you may disregard it entirely, and in that event it would be your duty to return a verdict of not guilty in this case.

DEFENDANT'S INSTRUCTION No. 24

You are instructed that the defendant is presumed to be innocent. This presumption clothes the defendant throughout the entire trial of the case, and unless or until that presumption of innocence is overcome by substantial evidence, it is your duty to acquit the defendant.

DEFENDANT'S INSTRUCTION No. 26

You are instructed that where a person has been acquitted of a charge, he may not thereafter be retried on the same charge, for he has been placed once in jeopardy. Jeopardy may occur in many ways. If two persons are jointly charged in a conspiracy and one of them is acquitted, the effect of that acquittal is to acquit the other person. A [361] person who is acquitted of a conspiracy to commit an offense cannot be convicted of the offense itself where, in order to be guilty of the offense, it would be necessary for him to be guilty of the conspiracy to commit the offense.

If you find, therefore, that Helen Merle Beverlin was acquitted of the charge of conspiracy to violate the Mann Act in the identical transaction in which Joseph Di Marzo is charged you must find that Joseph Di Marzo was also acquitted of the charge of conspiracy, and if you find that he was acquitted of the charge of conspiracy you are instructed that under the particular facts of this case such an acquittal would constitute an acquittal of the charge of violating the Mann Act itself.

Williams v. United States, 282 Fed. 481

United States v. Holts, 236 U. S. 140, 59
L.Ed. 504

Speiller v. United States, 31 Fed. (2d) 682

DEFENDANT'S INSTRUCTION No. 31

You are instructed that in order for a conspiracy to exist it is necessary that two persons engage in such a conspiracy, and if you find from the evi-

dence that one of the two persons was acquitted of the charge of conspiracy, this would constitute an acquittal of the other person, if there was no more than two persons named and involved. If you find that Helen Merle Beverlin was acquitted of the charge [362] of conspiracy to violate the Mann Act in the identical transaction in which Joseph Di Marzo is charged you must find that Joseph Di Marzo was acquitted. It will then be your duty to determine whether the acquittal of Joseph Di Marzo on the conspiracy charge constitutes an acquittal on the charge here before you.

In this respect I charge you that a woman who is transported, and who actively engages in securing her transportation, would be a conspirator with someone else who transported her or caused her transportation, and if you find that such a conspiracy existed it will be your duty to acquit Joseph Di Marzo, since one cannot be guilty of committing a crime where he is, in effect, acquitted of the conspiracy to commit it.

Williams v. United States, 282 Fed. 481

United States v. Holte, 236 U.S. 140, 59
L.Ed. 504

DEFENDANT'S INSTRUCTION No. 33

You are instructed that a party is bound by the testimony produced by or in his behalf, and in this respect the Government is bound by the testimony given by Helen Merle Beverlin that she went to

Hawaii of her own accord and because she herself wished to go.

United States v. Corlin, 44 Fed. Supp. 940

Dravo v. Fabel, 132 U. S. 487 [363]

DEFENDANT'S INSTRUCTION No. 34

You are instructed that where the evidence is reasonably susceptible of two interpretations, one leading toward innocence and the other leading toward guilt, you must adopt that one leading toward innocence and reject the one leading toward guilt.

DEFENDANT'S INSTRUCTION No. 35

You are instructed that where evidence is offered that the law has been unequally applied by law enforcement officers, a defendant is denied the equal protection of the laws guaranteed by the Constitution of the United States and it is a complete defense to a prosecution, and if you find that the defendant in this case was singled out for prosecution and other persons were not singled out for prosecution, you must acquit him.

Yick Wo v. Hopkins, 30 L. Ed. 220

Hysler v. Florida, 62 L. Ed. 584, 590

DEFENDANT'S INSTRUCTION No. 36

You are instructed that if the defendant has been singled out for invidious treatment by the law enforcement agencies in this case you must acquit him.

Hysler v. Florida, 62 L. Ed. 584, 590

DEFENDANT'S INSTRUCTION No. 37

The Government, in offering Helen Merle Beverlin as a witness in respect to the reasons she went to Hawaii, represents that this testimony must be accepted as true, and they are therefore bound by such testimony, and you must consider the Government bound by such testimony.

United States v. Corlin, 44 Fed. Supp. 940

Dravo v. Fabel, 132 U. S. 487

DEFENDANT'S INSTRUCTION No. 38-a

When a defendant has been formerly acquitted or convicted of a crime he is once in jeopardy and may not be legally convicted of that offense again. An acquittal may occur in many ways. It may be by trial before a jury or by operation of law. In this case the defendant has entered a plea of once in jeopardy on the ground that the acquittal of Helen Merle Beverlin of the charge of conspiracy to violate the Mann act acquitted him of the charge and therefore that he cannot be again tried.

It is for you to determine:

1. If it is the same act or transaction that is involved in both cases regarding which evidence has been presented before you, and whether the offenses were the same in each case.

2. If the parties were the same in each case.

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3. If there were no other persons involved in the case of conspiracy that Helen Merle Beverlin and Joseph Di Marzo.

If you find that the persons and parties and offense *and that only two persons were involved in the alleg* were the same in each case then an acquittal of Helen Merle Beverlin would operate to acquit the defendant and you would then have to find for the defendant on the plea of once in jeopardy.

DEFENDANT'S INSTRUCTION No. 40

You are instructed that the Constitution of the United States provides that no person can be twice placed in jeopardy on a criminal charge. Sometimes jeopardy results by operation of law. It is nevertheless a question of fact for you to find in this case.

It is the contention of the defendant that Helen Merle Beverlin, having been jointly charged with the defendant in indictment No. 15499 on the charge of conspiracy to violate the Mann Act, was placed in jeopardy by operation of law. That is to say, that the acquittal of Helen Merle Beverlin operated to acquit the defendant of the charge of conspiracy, and that since he was acquitted of the charge of conspiracy to violate the Mann Act he was acquitted of the offense for which he is here on trial. It is for you to find from the evidence if the parties were the same and if the offense was the same in both transactions, and if you do find that they [366] were the same, and if you find that Helen Merle Beverlin was acquitted and that by reason of that fact Joseph Di Marzo was acquitted,

then you must find for the defendant on the plea of once in jeopardy in this case.

DEFENDANT'S INSTRUCTION No. 45

You are instructed that the word "cause" as applied to this case has a well-known legal meaning, that is to say, the definition of the word "cause" is: To be the agent of, in bringing about a result; to compel; to act as the cause or agent in producing; to make or force a given result. [367]

[Title of Cause.]

No. 15,500-Crim.

EXCEPTIONS

1. The defendant duly and regularly excepted to the ruling of the Court overruling the defendant's objections to the jurisdiction of the Court to try the defendant and refusal to continue the case until after the war.

2. The defendant duly and regularly excepted to the ruling of the Court overruling objections to the jurisdiction of the Court by reason of certain treaties between the United States and the Government of Italy, and by reason of his detention under a Presidential Order.

3. The defendant duly and regularly excepted to the ruling of the Court that the defendant could be given a fair and impartial trial, without passion and prejudice, as provided by the Fifth Amendment to the Constitution of the United States.

4. The defendant duly and regularly excepted to the jurisdiction of the civil courts to try him.

5. The defendant duly and regularly excepted to the ruling of the Court that he was not denied the equal protection of the laws as guaranteed by the Fifth Amendment to the Constitution of the United States and was not placed in a different position than other persons similarly situated.

6. The defendant duly and regularly excepted to the ruling of the Court that he was not denied the adequate right of counsel and the effective right of preparation guaranteed by the Sixth Amendment to the Constitution of the United States.

7. The defendant duly and regularly excepted to the ruling of the Court that it was not necessary for the panel of jurors in the federal court in California to have women, although it was stipulated that women are on the juries in all the state courts, and that the state laws so provide.

8. The defendant duly and regularly excepted to the refusal of the Court to impanel women on the petit jury, and to objections to the jury because the panel was not composed of both men and women, as the juries are composed in the state courts of California.

9. The defendant duly and regularly excepted to the ruling of the Court holding that he was not once in jeopardy by reason of the trial and acquittal of Helen Merle Beverlin.

10. The defendant duly and regularly excepted to the ruling of the Court that Helen Merle Bever-

lin was not an accomplice under the facts of this case.

11. The defendant duly and regularly excepted to the Court's ruling advising the jury to find against the defendant on the plea of once in jeopardy.

12. The defendant duly and regularly excepted to the failure of the Court to direct a verdict in favor of the defendant, both at the end of the Government's case and at the end of the entire case.

13. The defendant duly and regularly excepted to the ruling of the Court that the evidence was sufficient to support the verdict, and that the evidence was insufficient to sustain the defendant's plea of once in jeopardy.

14. The defendant duly and regularly excepted to the ruling of the Court in refusing to send instructions to the jury room, as requested by the jurors.

15. The defendant duly and regularly excepted to unauthorized comments between the Court and the jurors, not in open court.

16. The defendant duly and regularly excepted to the ruling of the Court permitting cross-examination by the Government of its own witness, Mannie Rosegarten, and in permitting highly prejudicial testimony in said cross-examination.

17. The defendant duly and regularly excepted to the admission of testimony of other acts and transactions not properly admissible under the case at bar.

18. The defendant duly and regularly excepted to the Court conducting proceedings in the absence of the defendant, in violation of the Fifth Amendment to the Constitution of the United States.

19. The defendant duly and regularly excepted to the denial of a motion for judgment of acquittal.

20. The defendant duly and regularly excepted to the testimony of other acts, facts and transactions with other girls.

21. The defendant duly and regularly excepted to the admission and exclusion of evidence throughout the trial of the case, which exceptions are duly noted in the record.

22. The defendant duly and regularly excepted to the introduction of evidence relating to and purporting to be related to other girls in other transactions not alleged in the indictment, and also of acts that did not constitute similar offenses, as violative of the Fifth Amendment to the Constitution of the United States. (Typewritten transcript, p. 117.)

23. The defendant duly and regularly excepted to the exclusion of evidence in the testimony of Helen Merle Beverlin that there was nothing the defendant could have done to stop her from going to Hawaii. (Typewritten transcript, pp. 140, 141.)

24. The defendant duly and regularly excepted to testimony relating to monies paid to the defendant not within the issues of the case. (Typewritten transcript, pp. 153-156.)

25. The defendant duly and regularly excepted

to the ruling of the Court permitting examination of Helen Merle Beverlin with relation to a broken jaw.

26. The defendant duly and regularly excepted to the ruling of the Court denying his motion for a new trial and in arrest of judgment and objections to the jurisdiction of the Court.

27. The defendant duly and regularly excepted to the judgment and sentence of the Court.

28. The defendant duly and regularly excepted to the admission of evidence of Joan Day regarding the alleged nature of her work as a prostitute. (Typewritten transcript, pp. 89, et seq.)

29. The defendant duly and regularly excepted to the ruling of the Court sustaining objections to the testimony of Helen Merle Beverlin. (Typewritten transcript, pp. 240-243.)

30. The defendant duly and regularly excepted to the ruling of the Court denying the motions to direct the verdict both on the plea of not guilty and on the plea of once in jeopardy.

31. The defendant duly and regularly excepted to the procedure and proceedings in the trial of the case as violative of the Fifth and Sixth Amendments to the Constitution of the United States.

32. The defendant duly and regularly excepted to the refusal of certain instructions, as indicated on pages 263 to 274 of the typewritten transcript.

33. The defendant duly and regularly excepted to certain instructions given, indicated on pages 292 to 295 of the typewritten transcript, and to the advisory verdict on the question of former jeopardy, page 297.

34. The defendant duly and regularly excepted to the order denying a new trial and to the order denying motion in arrest of judgment.

MORRIS LAVINE

Attorney for Defendant and
Appellant.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO LODGE
PROPOSED BILL OF EXCEPTIONS

Good cause appearing therefor,

It Is Hereby Ordered that the time within which the appellant, Joseph Di Marzo, may lodge his proposed bill of exceptions on the appeal in the above-entitled case be enlarged to a period of 40 days from this date, that the Government have 20 days after the date of lodging of said bill of exceptions to propose amendments and corrections, and that the Court have 10 days thereafter within which to engross the same.

Dated: October 19, 1942.

PEIRSON M. HALL
Judge Presiding

[Endorsed]: Filed Oct 20 1942.

At a stated term, to wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-third day of November in the year of our Lord one thousand nine hundred and forty-two.

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding,
Honorable Francis A. Garrecht, Circuit Judge,
Honorable William Denman, Circuit Judge.

[Title of Cause.]

No. 10273

ORDER EXTENDING TIME TO FILE ASSIGNMENTS OF ERROR, AND TO SETTLE AND FILE BILL OF EXCEPTIONS

Upon consideration of the petition of appellant, and stipulation of counsel for appellee, and affidavit of Mr. Morris Lavine, counsel for appellant in support thereof, and good cause therefor appearing,

It Is Ordered that the time within which appellant may lodge his proposed bill of exceptions, and file his assignments of errors be, and hereby is extended to and including December 30, 1942; that the appellee United States of America may have to and including January 21, 1943 within which to file any proposed amendments to said bill of exceptions, and that the time within which

the bill of exceptions may be settled and filed be,
and hereby is extended to and including January
31, 1943.

[Title of District Court and Cause.]

ORDER APPROVING BILL OF EXCEPTIONS

An order approving the Bill of Exceptions having been presented to this Court and having been amended to correspond with the facts, is now settled, signed, and made a part of the records within the term and within the time fixed by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: January 29th, 1943.

PEIRSON M. HALL

United States District Judge

Received copy of the within Proposed Bill of Exceptions this 30th day of December, 1942.

LEO V. SILVERSTEIN,

United States Attorney

By LV

Ass't United States Attorney

[Endorsed]: Lodged Dec. 30, 1942.

[Endorsed]: Filed Jan. 29, 1943.

[Endorsed]: No. 10273. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Di Marzo, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 3, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10273

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH DI MARZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

NOV 21 1913

PAUL P. CHESNEY,

MORRIS LAVINE,

619 Bartlett Building, Los Angeles,

Attorney for Appellant.

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No. 10273

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH DI MARZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from a judgment of conviction of violation of the Mann Act. The appellant was indicted by a grand jury, consisting entirely of all men [R. 82], and on the panel for the selection of which there have been the names of no women for seven years [R. 82], women being systematically excluded from the grand jury.

A motion to quash the indictment on the ground that the grand jury which returned the indictment was not a grand jury selected in the usual mode of selecting grand juries in the State of California, and therefore did not conform to the provisions of Section 411, Title 28 U. S. C. A. was made and denied and exception taken. [R. 96, 97.]

The following proceedings were had in connection with the motion to quash the indictment:

"The Court: State that objection now.

Mr. Lavine: That the Grand Jury which was selected, and it may require some evidence unless we can stipulate as to the facts, was composed entirely of men, and does not conform to the provisions of Section 411, Title 28.

Mr. Neukom: I will stipulate it was all men.

Mr. Lavine: Will you further stipulate that there have been no women on the Grand Jury panel in the last two years?

Mr. Neukom: Not in the seven years I have been here.

Mr. Lavine: So that for a period of seven years there have been no women.

The Court: Which in my judgment is wholly immaterial. That is this Grand Jury you are talking about, Mr. Lavine?

Mr. Lavine: Yes, and that there have been no names of women in the panel itself. You will so stipulate?

Mr. Neukom: Yes, and not on the petit jury.

Mr. Lavine: I will accept the stipulation.

The Court: Very well, that is the stipulation as to that.

Mr. Lavine: Now, then, I move to quash the indictment on the ground it was returned by a Grand Jury composed not in accordance with the composition of grand juries as provided by Title 28, Section 411, U. S. Codes Annotated, which requires that jurors in a Federal court, and grand juries be composed in the same manner as they are in the State courts in which the courts are located, and I think

you will stipulate, Mr. Neukom, that there are women selected on the grand juries and the state courts of the State of California, and there are women selected on the petit juries.

Mr. Neukom: I will, and your Honor takes judicial notice of it." [R. 82-83.]

The appellant presents this sole point on appeal and abandons all other assignments of error:

The District Court Erred in Overruling the Objections to the Manner of Selecting the Grand Jury, and in Holding That Such Grand Jury Was Constituted in Accordance With the Practice of the State of California, When Women Were Excluded Therefrom.

Section 411, Title 28 U. S. C. A. is clear and mandatory upon the Southern District of California, Central Division. For years there has been a selective selection of grand jurors of the federal courts in which half of the population, the female sex, has been excluded in the federal courts, but not in the state courts. The prosecutor stipulated to seven years during which he had been in the office, as having no women on the federal grand jury. It was further stipulated that the county grand jury of Los Angeles county has had women selected during those years.

The grand jury which returned this indictment was therefore not legally constituted in accordance with the usual mode prevailing in the State of California.

The old time prejudice against women in public life and public service still prevails in the Southern District of California, Central Division. This concept has outlived

its usefulness. Women today are in the army, navy, and marine corps. They occupy position of danger and risk their lives along with the men, whenever and wherever necessary.

Shall they be systematically excluded from grand juries in the federal courts when their rights and abilities and usefulness on county grand juries in this state have been progressively recognized for years?

Such exclusion, it is respectfully submitted, vitiates the proceedings from which the indictment emanated and to which objection was duly and regularly taken and exception noted.

Title 28, Section 411, U. S. C. A.;

Glasser v. U. S., 86 L. Ed. 680, 696;

Code of Civil Procedure of California, Section 204, providing that jury lists shall be made up of “* * * men and women suitable and competent to serve as jurors * * *.”

Wherefore appellant prays for reversal of the judgment and an order dismissing the indictment.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

No. 10273.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH DI MARZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

DEC 24 1943

PAUL P. O'BRIEN,
CLERK

CHARLES H. CARR,
United States Attorney;

JAMES L. CRAWFORD,
Assistant United States Attorney;

RONALD WALKER,
Assistant United States Attorney,

United States Postoffice and
Courthouse Bldg., Los Angeles (12),
Attorneys for Appellee.

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No. 10273.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH DI MARZO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statment of the Case.

On July 1, 1942, an indictment, No. 15500, was filed charging the appellant with violation of the Mann Act [R. 30]. Appellant *was arraigned on July 29, 1942*, pleading not guilty [R. 32], whereupon the cause was continued to July 30, 1942, for setting. On July 30, 1942, the District Court ordered that motions objecting to the jurisdiction of the court be made in writing and filed by August 4, 1942 [R. 33]. Such objections were filed [R. 33] but it should be noted that they do not include the sole point relied upon by appellant in this appeal. The objections were overruled on August 8, 1942 [R. 42] and the cause set for trial on September 9, 1942.

The *point relied upon by appellant was raised for the first time* when the cause came on for trial on September

9th, when an objection to the jurisdiction of the court was interposed on the ground that the Grand Jury was composed entirely of men and did not conform to the provisions of Section 411 of Title 28 U. S. C. A. [R. 82].

Appellant has abandoned all other assignments of error.

It is appellee's position that appellant cannot succeed in this appeal because:

1. He is barred by his failure to attack the regularity of the indictment within the statutory period allowed.
2. He is barred by his failure to show any resulting prejudice from the alleged irregularity in the selection of the Grand Jury.
3. The provisions of the California Statutes on the inclusion of women jurors are directory, not mandatory, and hence the selection of the Grand Jury was in full conformance with the requirements of Section 411, Title 28, U. S. C. A.

I.

Appellant Is Barred by His Failure to Attack the Regularity of the Indictment Within the Statutory Period Allowed.

U. S. C. A. Title 18, Section 556a, provides:

"No plea to abate nor motion to quash any indictment upon the ground of irregularity in the drawing or impaneling of the grand jury or upon the ground of disqualification of a grand juror shall be sustained or granted unless such plea or motion shall have been filed before, or within ten days after, the defendant filing such plea or motion is presented for arraignment. * * *"

Since appellant was arraigned on July 29, 1942 [R. 32] and the point was first raised in open court on September 9, 1942 [R. 82], he has considerably exceeded the ten day limitation within which such a motion might be made. The language of the court in *State v. Collins* (D. C. Tex.), 10 Fed. Supp. 1007, 1009, in discussing Section 556a is pertinent:

“The recent act by the Congress, approved April 30, 1934, shows the trend, not only of legislation, but the best thought at the present time with reference to technicalities of the sort under consideration.”

Section 556a was enacted in 1934, but it is apparent from reading various cases before that date that the courts have always placed importance on the time element. In *Wolfson v. United States* (C. C. A. 5), 101 Fed. 430, a motion to quash was denied because filed more than two months after return of the indictment. And in *United States v. Louisville & N. R. Co.* (D. C. Kan.), 177 Fed. 780, 785, a delay of 35 days after service of process was held sufficient to waive any objections to the competency of the Grand Jury. In *Agnew v. United States*, 165 U. S. 44, 17 S. Ct. 238, 41 L. Ed. 624, it is held that the defendant must take the first opportunity in his power to make the objection.

Appellee maintains that appellant's objection as to the Grand Jury is barred not only by the statutory limitation, but under the previous decisions, in his failure to formally raise the point in his “Objections to the Jurisdiction of the Court,” filed on August 7, 1942 [R. 33].

II.

Appellant's Failure to Show Prejudice Arising Out of the Alleged Defect in the Indictment Is Fatal to a Motion to Quash.

Appellant's objection to the return of the indictment by a grand jury from which women were excluded did not contend that the rights of appellant were in any way jeopardized or prejudiced thereby. In fact, an examination of the record shows reliance by appellant upon technical grounds only, and an express negation of any knowledge of an existing bias or prejudice.

"The Court: Your motion is on purely technical grounds, or on the ground that some prejudice resulted to your client?

Mr. Lavine: On technical grounds.

The Court: You are claiming no actual bias or prejudice to your client by virtue of the fact that it was a jury of men?

Mr. Lavine: I don't know whether it was biased or prejudiced.

The Court: I am speaking now of actual prejudice to your client by virtue of there being men instead of women. Do you think your client would have had, in other words, would have had a fairer hearing before a grand jury, or greater consideration by a grand jury which had been selected in accordance with the usage and customs in a state court, or had there been women on the grand jury?

Mr. Lavine: I don't know whether or how to pass on that, that is something we cannot prognosticate, the degree of fairness, but my objection is based on non-compliance of the statute." [R. 83.]

It is the statutory rule that such an objection in matter of form only will not be sustained.

U. S. C. A. Title 18, Section 556:

“No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. * * *

In *United States v. American Medical Ass'n.*, D. C., D. C. 1939, 26 Fed. Supp. 429, it has been held that a court's power to go back of an indictment to inquire concerning irregularities is sparingly used and *justified only where a clear and positive showing is made of gross and prejudicial irregularity*. An allegation was made by defense counsel upon information and belief that certain irrelevant testimony was given to the Grand Jury and that government counsel requested and persuaded it to return the indictment. A motion was made for approval by the court for defense counsel to elicit from the former Grand Jury information as to the proceedings before it so that a motion to quash the indictment might be made. It would appear that appellant's counsel in the present case, in his failure to assert prejudice, is in the same position as the defense in the case under discussion as will be shown from the following excerpt from the decision (page 431):

“(Defendants) * * * admit a pleading to abate or quash must be certain and definite in its allega-

tions of prejudicial facts. They assert as a reason for asking an investigation by the court that they are unable to make the requisite averments and oath. Thus we have the novel situation of defendants admitting that they are in no position to file the essential pleading to justify the court in making an inquiry, yet nevertheless asking that the inquiry be ordered anyway, in the expectation or hope that material will turn up to support a proper plea. Manifestly the court ought not grant such a motion. It is lacking in every essential of a plea in abatement or motion to quash. Its allegations, made only on information and belief, are vague and uncertain—mere statments of conclusions, wholly lacking in factual details. The effect of granting such a motion would be to break down all legal checks against technical, dilatory tactics. The strong presumption of the regularity of grand jury proceedings would no longer prevail.”

As to the general rule that defendant cannot complain of, nor take exception to, irregularities which do not act to his prjudice, we respectfully refer to:

Agnew v. United States, 165 U. S. 36, 17 S. Ct. 234, 41 L. Ed. 624 (627);

United States v. Cobban (C. C. Mont.), 127 Fed. 713 (715);

United States v. Ewan (C. C. Fla.), 40 Fed. 451.

The motion to quash must specifically set out the injury, according to the decision in *State v. Collins* (D. C.

Tex.), 10 Fed. Supp. 1007 (1009), citing as supporting authority, in addition to the *Agnew* case (*supra*), the following:

Lowdon v. United States (C. C. A. 5), 149 Fed. 673, 674;

Wilder v. United States (C. C. A. 4), 143 Fed. 433, 439;

United States v. Nevin (D. C. Colo.), 199 Fed. 831, 833;

Hillman v. United States (C. C. A. 9), 192 Fed. 264, cert. den.;

Breese v. United States, 226 U. S. 1, 33 S. Ct. 1, 57 L. Ed. 97, 102;

Ard v. United States (C. C. A. 5), 54 F. (2d) 358, cert. den.;

Luxenberg v. United States (C. C. A. 4), 45 F. (2d) 497, 498, cert. den.

The following pertinent excerpt from *Wolfson v. United States* (C. C. A. 5), 101 Fed. 430, 433, covers the situation as presented by the case at issue:

“When questions relating merely to the regularity of the organization of the grand jury are raised in time, they are not viewed with much favor. The courts would peremptorily check and punish an effort to corruptly organize a grand jury or would prevent any injustice or unfairness in its formation; but when nothing of that kind is shown, or even alleged, the court is reluctant to grant a motion to quash the indictment on account of irregularities that work no hardship or injustice.”

Appellee submits that appellant's failure to show any prejudice, bias or injustice resulting to him from the exclusion of women from the Grand Jury is an effective bar to his contention.

III.

The Provisions of the California Law for the Inclusion of Women Jurors Are Directory and Not Mandatory, and Hence Not Binding Upon the Federal Courts of the District in the Selection of a Grand Jury.

U. S. C. A., Title 28, Section 411, provides:

"Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Appellant's contention is that Section 204 of the Code of Civil Procedure of the State of California requires the inclusion of women on juries within the state and hence within the United States courts. However, it was directly held in *People v. Parman*, 1939, 14 Cal. (2d) 17, 92 Pac. (2d) 387, 388, by the California Supreme Court that the provisions of Section 204 are directory and not mandatory.

The general rule in California is well stated in the following language from *People v. Shannon*, 203 Cal. 139, 263 Pac. 522, 523:

"* * * there is nothing in the State or Federal Constitutions, or in any statute, which guarantees

one accused of a crime a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. *People v. Durrant*, 116 Cal. 179, 199, 48 Pac. 75. He cannot complain if he is tried by an impartial jury and can demand nothing more."

The situation covering the exclusion of women from Federal Grand Juries in this District is covered by a decision of Judge Yankwich in the case of *United States v. Ballard* (D. C. Cal.), 35 Fed. Supp. 105, 1 F. R. D. 483, in which the ruling was adverse to appellant's contention.

Appellant has relied upon the decision in *Glasser v. United States*, 315 U. S. 60, 86 L. Ed. 680 (696). The point is not directly ruled on, however, in the *Glasser* case. There, two Acts of the State of Illinois, then recently passed, required state jury lists to contain the names of women. The court held *only* that in view of the short time elapsing between the effective date of the Illinois Acts and the summoning of the Grand Jury, *it was not error to omit the names of women* from Federal jury lists.

To contend that the *Glasser* case supports appellant's position in the case at bar, is to draw an inference therefrom which cannot be supported by the facts or the ruling. It was not necessary in the *Glasser* case for the court to interpret the Illinois Acts as making it mandatory to include women on the jury list. In California a direct ruling has been made that Section 204 of the Code of Civil Procedure is directory only and not mandatory.

People v. Parman, supra.

The cardinal principle determining the legality of the selection is that, excepting illegal discrimination on racial grounds, the guarantee of due process does not prohibit the choice of jurors from one sex.

Strauder v. West Va., 100 U. S. 303, 25 L. Ed. 664.

In view of the direct holding in *People v. Parman* (*supra*) that Section 204 of the California Code of Civil Procedure is directory and not mandatory, it necessarily results that the proceedings for the selection of the Federal Grand Jury were entirely regular and in accordance with Section 411 of Title 28 of the United States Code.

Wherefore, appellee submits that the judgment and verdict of the District Court should be sustained.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney;

JAMES L. CRAWFORD,
Assistant United States Attorney;

RONALD WALKER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 10300

22
United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

MAY 24 1943

PAUL P. O'BRIEN,
CLERK

No. 10300

United States
Circuit Court of Appeals
For the Ninth Circuit.

PHILLIP SUETTER,

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vs.

UNITED STATES OF AMERICA,

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Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland, Oregon,
For the Appellee.

In the District Court of the United States
For the District of Oregon
March Term, 1942.

Be It Remembered, That on the 23rd day of May 1942, there was duly filed in the District Court of the United States for the District of Oregon, an Indictment, in words and figures as follows, to wit:
[1*]

In the District Court of the United States
For the District of Oregon

UNITED STATES OF AMERICA

vs.

PHILLIP SUETTER,

Defendant.

INDICTMENT FOR VIOLATION OF SECTION 77q(a) (1), Title 15, U.S.C.A., and SECTION 338, Title 18, U.S.C.A.

United States of America,
District of Oregon—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations do find, charge, allege and present:

* Page numbering appearing at foot of page of original certified Transcript of Record.

COUNT ONE:

That Phillip Suetter, hereinafter referred to as the defendant, and late of the County of Josephine and State of Oregon, in the district aforesaid, on to-wit: January 15, 1934, and continuously thereafter up to and including June 30, 1941, and at the various times of the commission of the various offenses hereinafter set forth, in the district aforesaid, devised and intended to devise a certain scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from a certain class of persons then residing in divers states of the United States; that is to say, from that class of persons who were desirous of making profitable and paying investments in units of Suetter Placer Mines, parts in the Suetter Placer Mines, and other interests in Suetter Placer Mines, which said persons are hereinafter designated and referred to as the persons intended to be defrauded and include the fololwing: [2]

Francis J. Beckman
Dubuque, Iowa

Paul P. Rhode
Green Bay, Wisconsin

Stephen A. Bubacz
Chicago, Illinois

Ralph T. Montag
Portland, Oregon

William E. Phillips
Chicago, Illinois

A. C. Kuncl
Oak Park, Illinois

Marion Chester Laird
Chicago, Illinois

Leo Gartland
Marion, Indiana.

which said scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, so devised and intended to be devised by the said defendant, was in substance as follows, to-wit:

1. The defendant would and did, prior to the 22d day of May, 1939, purchase certain mining claims covering property in Josephine County, Oregon;

2. It was a further part of said scheme and artifice to defraud that said defendant would and did, on or about January 2, 1937, execute a trust agreement dated January 2, 1937, and filed in Josephine County, Oregon, in Miscellaneous Record No. 11 at Page 238, on January 18, 1937, as Instrument No. 55914, which said trust agreement provided, among other things, that he, the said Phillip Suetter, should and would take title to certain mining claims in Josephine County, Ore-

gon, said claims being particularly described in said trust agreement, and would as trustee of said claims administer them for the benefit of the persons hereinabove designated and referred to as the persons intended [3] to be defrauded, and that said property should be considered, for purposes of the administration of said trust, as eight hundred (800) undivided units, said units to be the subject of purchase by said persons intended to be defrauded and the purchasers thereof to be entitled to a pro rata share of the unit price or income thereof; the defendant, Phillip Suetter, to keep a true and accurate set of books and accounts showing the income and disbursements of the trust and to be paid a monthly salary out of income for his services in the management of said trust;

3. It was a further part of said scheme and artifice to defraud that said defendant would and did at all the times hereinafter referred to in this indictment dominate and control the administration of said trust and was the sole trustee thereof;

4. It was a further part of said scheme and artifice to defraud that the said defendant would and did solicit the said persons intended to be defrauded to invest their moneys and properties in the units, parts and other interests of Suetter Placer Mines, Josephine County, Oregon;

5. It was a further part of said scheme and artifice to defraud that the said defendant would and did obtain from one W. E. Phillips, an employee of the Link-Belt Company of Chicago, Illinois, a

promissory note in the sum of \$5,000.00 in payment for five units of Suetter Placer Mines;

6. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that it was a further part of said scheme and artifice to defraud that the said defendant so operating as aforesaid would and did, in order to induce the persons intended to be defrauded to subscribe to the units, parts and interests in Suetter Placer Mines, and in order to lull the said persons intended to be defrauded into a false sense of security with respect to such investments, [4] and in order to enable the defendant to convert to his own use and benefit a large part of the moneys and other valuable properties of the persons intended to be defrauded, and to enable the defendant to retain said moneys and other properties of value, and in order to induce the persons intended to be defrauded to retain their units, parts and other interests in the said Suetter Placer Mines, by divers false and fraudulent pretenses, representations and promises and by alluring and specious predictions, made by means of circulars, telegrams, letters and other written communications and oral statements, represent to the persons intended to be defrauded that:

A. That the defendant, Phillip Suetter, was the sole owner of Suetter Placer Mines, and had a clear and absolute title to said Mines, whereas in truth and in fact, as the said defendant then and there well knew, he was not the sole owner of Suetter Placer Mines, and he did not have a clear and absolute title to said Mines, and further, as the

said defendant then and there well knew, Ralph T. Montag had a one-half interest in said Suetter Placer Mines, and said Ralph T. Montag had a first mortgage on said Suetter Placer Mines as security for a \$10,000 indebtedness;

B. That said defendant would keep a true and accurate set of books and accounts showing the income and disbursements of the Suetter Placer Mines Trust, whereas in truth and in fact, as the said defendant then and there well knew, he would not and did not keep a true and accurate set of books and accounts showing the income and disbursements of the Suetter Placer Mines Trust;

C. That employees of the Link-Belt Company of Chicago, Illinois, had agreed to invest \$80,000 in the Suetter Placer Mines, whereas in truth and in fact, as the said defendant then and there well knew, the employees of the Link-Belt Company of Chicago, Illinois, had not agreed to invest \$80,000 in the Suetter Placer Mines; [5]

D. That all of the moneys, funds and property invested in the units, parts and interests of Suetter Placer Mines, would be used to purchase mining machinery and for the purpose of defraying expenses in connection with the operation of Suetter Placer Mines, whereas in truth and in fact, as the said defendant then and there well knew, all of the moneys, funds and property invested in the units, parts and interest of Suetter Placer Mines, would not be used to purchase mining machinery and for the purpose of defraying expenses in connection with the operation of Suetter Placer Mines, and

further, as said defendant then and there well knew, a large portion of the said moneys, funds and properties invested in the units, parts and interests of the said Suetter Placer Mines would be and were converted by the said defendant to his own use and benefit;

E. That investors in the units, parts and interests of Suetter Placer Mines, would realize large returns on their investments, whereas in truth and in fact, as the said defendant then and there well knew, the said investors in the units, parts and interests of Suetter Placer Mines, would not realize large returns on their investments;

F. That an investment in the units, parts and interests of Suetter Placer Mines, was a safe, sound and conservative investment, whereas in truth and in fact, as said defendant then and there well knew, an investment in the units, parts and interests of the said Suetter Placer Mines, was not a safe, sound and conservative investment, and further, as the said defendant then and there well knew, an investment in the units, parts and interests of the said Suetter Placer Mines was a highly speculative investment;

G. That defendant had hired engineers who had tested the properties of Suetter Placer Mines, Josephine County, Oregon, and that said engineers had submitted a favorable report, whereas in truth and [6] in fact, as said defendant then and there will knew, he had not hired engineers who had given favorable reports;

H. That production would be commenced by September or November, 1937, whereas in truth and in fact, as said defendant then and there well knew, production would not be commenced by September or November of 1937, and further that production was not commenced by September or November of 1937;

I. That the defendant had a great deal of practical experience in mining and had been financially successful, whereas in truth and in fact, as said defendant then and there well knew, he did not have a great deal of practical experience in mining and had not been financially successful;

J. That an investment of \$300,000 would bring returns to an investor of from one to three million dollars during the three years commencing September 30, 1938, whereas in truth and in fact, as said defendant then and there well knew, an investment of \$300,000 would not bring returns to an investor of from one to three million dollars during the three years commencing September 30, 1938;

K. That he would commence shipping gold to the mint from Suetter Placer Mines within ninety days after December 16, 1938, whereas in truth and in fact, as said defendant then and there well knew, he would not commence shipping gold to the mint within said ninety days after December 16, 1938;

L. That the holdings of Suetter Placer Mines would pay dividends of 20 per cent of a hundred million dollars, whereas in truth and in fact, as

said defendant then and there well knew, the holdings of Suetter Placer Mines would not pay dividends of 20 per cent of a hundred million dollars;

M. That the property of Suetter Placer Mines was proven, whereas in truth and in fact, as said defendant then and there well knew, the property of Suetter Placer Mines was not proven; [7]

N. That the investors in Suetter Placer Mines would never lose the money they invested, whereas in truth and in fact, as said defendant then and there well knew, the investors in Suetter Placer Mines would lose the money they invested;

O. That the defendant had invested over \$50,000 of his own funds in Suetter Placer Mines, whereas in truth and in fact, as said defendant then and there well knew, he had not invested over \$50,000 of his own funds in Suetter Placer Mines.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said defendant, so having devised the said scheme and artifice to defraud and for obtaining money and property by means of false pretenses, representations and promises set out and described herein, did take and convert to his own use and benefit money and other properties of value obtained from the persons intended to be defrauded by virtue of the said scheme and artifice herein described.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that the said defendant, so having devised the said scheme and artifice to defraud and for obtaining money and prop-

erty by means of false and fraudulent pretenses, representations and promises, as in this count alleged and set forth, and for the purpose of executing and attempting to execute the said scheme and artifice to defraud, on to-wit: November 21, 1939, at Grants Pass, in the State and District of Oregon, and within the jurisdiction of this Court, unlawfully, knowingly and feloniously did place and cause to be placed in the Post Office of the United States, to be sent and delivered by the Post Office Establishment of the United States, according to the direction and address thereon, a certain letter, to-wit: a letter of the tenor following: [8]

“Picture of
Indian Girl)

Phil Suetter,
President

Oregon Mining Investment Co., Inc.

Log Cabin

Graves Creek, Oregon

November 22nd 1939

Rev Paul P Rhode

Bx 65

Green bay Wisconsin.

Dear Bishop.

On my arrival west I found one of mymen had broken his leg in four places, and I found things rather difficult situation Hoever this Montsignor, Here had never tried to use any thing toward me but Milas.

So far it has gotton him nothing but Grief, I want you and Arch Bishop Beckman to

realize any thing that I do it is for you both. For your information. I have the news presented to me that he has been to a certain attorneys office with his attorney, try to accuse me of forging, some writing on those notes.

Of course that is something that I will may no attention to on account of the peticular source it came from, But I should have the support of you and Arch Bishop Beckman to make this a Hollowing success.

Afterall Bishop, I have only did what was for the interest of both you and Arch Bishop Beckman, and you ask me personally to do things and I did it. Why Cannot you and the Archbishop sit down with me and go over these matters.

There is many things I would like to tell you, But I will never to write them, All I serve from you Bishop is Support, and you are that one can absoutely help me in many ways, Further Remmember this your investment is involved in the three mines, California, Ajax, and Hercules Mines.

The most trouble was because I insisted that they take care of your investment in that mine, which was done in part of my contract which they assumed, signed by the Archbishop Beckman. And Further I returned them there \$178.-000. Worth of Notes.

Two very high prices attorneys, have begged me for Hours for the cancelation of the Con-

tract that the Bishop Made with me, which has been default until few days,

Now this man Barney Payton, I have statements to make at this time only if you will check with the Union Pac you will learn plenty, and the Wentworth, & Irvin Auto Co of the [9] Pac Northwest at Portland, many other that I can mention, He has pulled many similar deal just like the pulled on you. as he stated to me, with the help of some cheap chizzling attorney in Chicago.

Bishop if you owe anything to any one you owe to me? I protected and I intend to continue doing so, If I recieve support from any one with the two years you will have your investment, with a mighty fine interest.

Sincerely Yours

PHILLIP SUETTER"

which said letter, when so placed and caused to be placed in said Post Office of the United States, then and there was enclosed in an envelope bearing uncanceled United States postage at the first class rate and the following return card, direction and address, to-wit:

"After 5 days, return to

Phil Suetter

Grants Pass Oregon.

AIR MAIL

Rev Paul P Rhode

Green Bay

Box 65.

Wisconsin"

and that the said person to whom the said letter and said envelope were so addressed was then and there one of said persons intended to be defrauded and whose money and property, according to said scheme and artifice, were to be obtained by means of the false and fraudulent pretenses, representations, and promises as aforesaid;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT TWO:

That the said defendant, Phillip Suetter, hereinbefore named in the first count of this indictment, so having devised and employed the scheme and artifice to defraud described in the first count of this [10] indictment, under the circumstances and conditions set out in the first count of this indictment, the allegations of which count descriptive of said circumstances, conditions, scheme and artifice, and of the connection of said defendant therewith, being hereby incorporated in this count of this indictment by reference to the first count as if they were here repeated in full, and for the purpose of executing and attempting to execute the said scheme and artifice to defraud, on to-wit: the 16th day of December, 1940, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, unlawfully, knowingly and feloniously

did place and cause to be placed in the Post Office of the United States, to be sent and delivered by the Post Office Establishment of the United States, according to the direction and address thereon, a certain letter, to-wit: a letter of the tenor following:

“Phillip Suetter

P. O. 677

Grants Pass, Oregon

Mining Properties
in Josephine County
State of Oregon

Dec. 16, 1940.

Most Rev. Paul P. Rhode,
Green Bay, Wis.

Dear Bishop Rhode:—

Received your letter of the 14th with contents. I was mistaken in the amount of the check.

I regret very much that my financial condition at present will not permit me to make a settlement with you. I spent a great deal of money trying to get a settlement of my contract with Archbishop Beckman, and because of the unwelcome publicity I received when his agents advertised me over the radio and through the press, I have been unable to make the contacts I might otherwise have made.

It will take some time to overcome this, aside from the personal hurt to my feelings in the matter. Nothing would please me better

than to be able to return to you every dollar you invested with me in the mines, but in order to do this, I must work them and produce it from the ore. This will take some time, as machinery belonging to me has been attached by Archbishop Beckman's attorney here in a law suit for his fees, and I need it in my operation. However, with God's help, and my constant prayers, I am hopeful all will yet be well. [11]

If Archbishop Beckman had paid me the amount due on my contract, all this would not have happened, as I could have gone ahead with the mines, and would have been in a position to make payments to you from time to time.

For the past week I have been quite ill with the flu. The pre-trial comes up Thursday. If it be God's will that I be persecuted and prosecuted by a Vicar of Christ on earth, then I bow to His will.

Thanking you for sending me the papers, I am

Most respectfully yours,

PHILLIP SUETTER

P.S. I won my case with Gilmore last Friday. He has to pay all court costs, etc."

which said letter, when so placed and caused to be placed in said Post Office of the United States, then and there was enclosed in an envelope bearing uncanceled United States postage at the first

class rate and the following return card, direction and address, to-wit:

“3921 N.E. 81st Ave.,
Portland, Ore.

Special Dil

Most Rev. Paul P. Rhode,
Box 65
Green Bay, Wis.”

and that the said person to whom the said letter and said envelope were so addressed was then and there one of said persons intended to be defrauded and whose money and property, according to said scheme and artifice, were to be obtained by means of the false and fraudulent pretenses, representations, and promises as aforesaid;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT THREE:

That said defendant, Phillip Suetter, hereinbefore named in the first count of this indictment, so having devised and employed the [12] scheme and artifice to defraud described in the first count of this indictment, under the circumstances and conditions set out in the first count of this indictment, the allegations of which count descriptive of said circumstances, conditions, scheme and

artifice, and of the connection of said defendant therewith, being hereby incorporated in this count of this indictment by reference to the first count as if they were here repeated in full, did unlawfully, feloniously, wilfully and knowingly, in the sale of a security, to-wit: interests of the Suetter Placer Mines, by the use of the United States mails, employ said scheme and artifice to defraud, the use of the United States mails being in the manner following, to-wit: the defendant on to-wit: the 28th day of May, 1939, at Grants Pass, in the State and District of Oregon, and within the jurisdiction of this Court, did knowingly, unlawfully, wilfully, fraudulently and feloniously place and cause to be placed in the Post Office of the United States at Grants Pass, Oregon, for submission and delivery thereof by the Post Office Establishment of the United States according to the direction and address thereon, a certain letter, to-wit: a letter of the tenor following:

“(Picture of Indian Girl) P.O. Box 677

Kateri Tekakwitha

Group

Mount Reuben Mines

Ajax :: California ::

Hercules

Grants Pass, Oregon

May 28, 1939

Francis J. Beckman,
1105 Locust Streets,
Dubuque, Iowa.

Dear Archbishop:

After my talk to you on the phone this morning, well it cost me thirty-five dollars to talk to you, cost me \$27 to talk to Lasecki, and I am safe to say its cost me over \$500.00 phoning, where this money would all help to get this money into our operation and there's none to fault on this only your friend, O'Laughlin. He's not only disturbing you and me but everybody in the country. Do you suppose that's going to help this matter any. He banks on being supported by you and Father Kessler. Now he already had Mr. Pricestead, to measure up the basement at my cottage on Smith River for three rooms to be built on—I want to get all this over to you clearly. If ~~you~~ they can use any of these letters on me, they will try to further their own interests. Their success [13] in what they are trying to pull will mean your failure.

Now here is about \$200,000 worth of machinery setting idle, all for no reason, only to satisfy a wandering priest. Not only that but he wants to condemn a man to get controlling interest of one of the largest projects in North America. That can't ever be done, I will stand on my rights and I can't understand where they get this noise, of being your money when I went through all kinds of tortures and grieved to sell you paper to make this a howling success for you and I, and everybody concerned. Bishop Rhody has \$28,000 in cash besides a note he bought from you, Father Steve, Father Nichols signed ~~how~~ \$50,000 endorsements to sell Shaw, now this is just a few I am mentioning, and I have to protect all these people. There are a number of others. Why this wouldn't stand in any court in the world with the documents I have from you. Which I sure hope that you can take this man O'Laughlin away from here before he ruins you and me, both. And he certainly disgrace you.

Last Wednesday, when Walker and I were in Medford, we had found that he had phoned Reems from somewhere on the coast, that he was going to be in his office, but he never appeared, and then we found that he had been over at Wheeler's, making a lot of fuss over there. Now if you don't want to take it upon yourself to stop this man and keep him from annoying me, I think I can. Walker or any-

one else cares nothing for his power of Attorney, it means nothing. His Power of Attorney will mean your ruination by the way it looks now.

After Walker and I came from Medford he *steeped* into the First National Bank at Grants Pass and Mr. Hacketts insinuated to Mr. Walker, he heard that we were having some difficulties. He insinuated that it came from O'Laughlin, Walker and I don't know whether it was him, but they did mention that it would be settled out of court. Now that doesn't sound so 'Hot' and there's nothing to settle. only what you can *I can* settle, after this is in full operations. I am protecting you and you only, but when you have two men pulling this kind of stuff, accusing me of writing anything on these notes after you had signed them, they sure have themselves in bad or any other time. Its just about time you are getting busy. I had photostatic copies made of all of our transactions and turned them over to Roberts, which I was compelled to do to protect myself and my interests and others. I've got to have money here, we've done all the testing we need to do on this project and they've rumored around in this country there is plenty of money so get it over here and I'll build you the biggest project any man ever saw and turn it over to you a going concern, to you personally.

Now then I've bought the Bear Mine without any money and I've sure got to get busy and go to testing. I've got to get a screen on the Leland property. This is something I've had under way for sometime, in getting 2/3 interest in the Wheeler property for 10 cents on the \$1 or maybe a little more, but I don't dare to say much before I get the job done, because thru these other men always talking to you and get you confused they use everything against me. All they can see is this big project. Now Walker and I have talked this thing all over and we began working on the Ajax on this high grade ore. Now then if you are not going to and can't make the grade to get things lined up for a howling success I want you to let me know because I have started to bring other capital in, which I can do with Walker's help and I don't want to until I get the final from you, because you have my word that I'll not do this, interest anyone else in this property until I get the final word from you to go ahead., saying that you will not furnish anymore capital and I want that in writing. It would certainly delay matters if that would be the case. And I also want you to know what I had in mind about the John Bosco, that will make us plenty of money to make a deal with Terwilliger for a little [14] sum which I think I can do and later on I can ~~hold that~~ haul that *oare* to our mill or put a small mill on that property and

get it started. Terwilliger is patented land and my buildings are on there, that's why I was slow in taking them off. I had that in mind at all times and I know this can be done then I can protect other interests I have on French Hill. This may be a little confusing to you in this letter but I can explain that all. This will mean \$1,000,000 worth of property with St. John Bosco, The Leland Property, and the Josephine, by \$100,000 to put this equipment on the California Ajax and Hercules would do it all, but it may not take half of this amount, but where it wouldn't take half of it, what I mean by that is that I'd put a small mill which will take \$25,000 for a flexible mill and this retard I'm having built which is not costing me a penny until its operating. I could get all the money we would need for a 10,000 mill but it seems that you always say that I promised this and I promised that, I've done a million and a half's worth now with less than \$400,000 and there isn't any man that can work under this pressure, Like I've been doing and accomplish what I have. First it was Hogan, then Gillmore now its 2 priests, and you could have settled all this by just setting down on them. I have discounted your notes, been put to attorney expenses for a lot of money and still I'm not discouraged, as I'm not easily discouraged.

Now here you are setting with one hundred million dollars in your lap and waiting for someone to ruin it. Let anybody investigate this after we get it in operation and it will turn for \$30 to \$40 million. The Standard Oil has \$400,000,000 and they are looking for a project like this slate. Mr. Walker had a call from Chicago wanting him to connect me up with them. I'm only setting tight for *you* protection.

Now I want to tell you again, you've *get* to have something definite here by Wednesday.

Yours very truly,

PHILLIP SUETTER

PHILLIP SUETTER"

which said letter, when so placed and caused to be placed in the Post Office of the United States, then and there was enclosed in an envelope bearing uncanceled United States postage at the first class rate and the following return card, direction and address, to-wit:

"Mount Reuben Mines
Ajax :: California :: Hercules
P. O. Box 677
Grants Pass, Oregon

Francis J. Beckman,
1105 Locust Ave.,
Dubuque, Iowa." [15]

and that the said person to whom the said letter and said envelope were so addressed was then and

there one of said persons intended to be defrauded and whose money and property, according to said scheme and artifice, were to be obtained by means of the false and fraudulent pretenses, representations, and promises as aforesaid;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT FOUR:

That said defendant, Phillip Suetter, hereinbefore named in the first count of this indictment, so having devised and employed the scheme and artifice to defraud described in the first count of this indictment, under the circumstances and conditions set out in the first count of this indictment, the allegations of which count descriptive of said circumstances, conditions, scheme and artifice, and of the connection of said defendant therewith, being hereby incorporated in this count of this indictment by reference to the first count as if they were here repeated in full, did unlawfully, feloniously, wilfully and knowingly, in the sale of a security, to-wit: interests of the Suetter Placer Mines, by the use of the United States mails, employ said scheme and artifice to defraud, the use of the United States mails being in the manner following, to-wit: the defendant on, to-wit: the 29th

day of May, 1939, at Grants Pass, in the State and District of Oregon, and within the jurisdiction of this Court, did knowingly, unlawfully, wilfully, fraudulently and feloniously place and cause to be placed in the United States Post Office at Grants Pass, Oregon, for submission and delivery thereof by the Post Office Establishment of the United States according to the direction and address thereon, a certain letter, to-wit: a letter of the tenor following: [16]

“(Picture of Indian Girl) P.O. Box 677
Kateri Tekakwitha
Group
Mount Reuben Mines
Ajax :: California ::
Hercules
Grants Pass, Oregon

May 29, 1939

Francis J. Beckman
1105 Locust Ave.,
Dubuque, Iowa.

Dear Archbishop:

I arrived at the mine Sunday evening from Portland. Everything seems to be going 100% but the payroll and other expenses. Now Walker just feels disgusted about this whole matter and I can't blame him. He phoned the attorney while I was in Portland and he thinks you are giving him the run around. Our engineer, Walker and myself had quite a talk

this morning. They say if there was never another drill run in the tunnel there's enough good ore to keep us running for 30 years in sight.

Now, I have had about all I can stand of this kind of work. There has to be \$30,000 right on the line here this week or I'll have to do something else. This thing "I promise this" and "I promise that" isn't going to get this mine going. I've got to jump out here and get a mill. I never saw so much ragging over anything and being a developed mine—everything to gain and nothing to lose—the only way I can look at it is that they just want to cheat me out of my interest, then wreck it. I work day and nite and I'm not going to do it any longer. Here is the payroll due, here's \$1600 for equipment, \$600 for dinamite, and I consider you are all getting a free ride here on the biggest thing in the world. It is just a shame for Roman Catholics to cause all this fuss when a man is trying to kill himself to make you money. God is my guide and there is no one going to get me to do anything only the right thing. I'm not signing anything other than what our deal is and I don't see why that you set. If you haven't got the money or can't get it wire me. I've got to do something else. I've taken in the Bear property, that is, on Josephine creek. I give \$6,000 of my notes that you have signed to a Mr. Neil Allen, attorney, to clean up the

deal for me. I have a sale for this property whereby if it is consumated it will make you all money, and I can do so if I am left alone. Now, don't use this as a promise but I will do my very best and I've got to have it in shape to do it. I'm doing 10 men's work right now and I'd continue doing it until I make this a howling success. How do you ever expect to get in operation when you have this *rangling* all summer long when you should be at work and producing. I don't understand what you are thinking about. These promises won't do it, so kindly write me or wire me if you aren't going to send any money and have it over with and I'll know what to do, because you have my word that I will not do anything until you give me your final. I'm driving over to St. John Bosco as soon as I mail this letter. I'm going to make a deal for that and just put a man in charge until such time that I can get over there and get it in shape, and I'll make that make money and plenty. Now we have \$175,000 of equipment laying idle just to satisfy one wandering priest to gain his point, regardless of what you do or think I never want to have anything to do with this man. I don't want to say any more about him and I want you to take him out of my house. He claims he has lost \$78,000 in Nevada and that is [17] nothing to me. But, I will say this, if he had been of any help and acted the way a man should he *would had*

a good living for the rest of his life right with me. But, when a man pulls these kind of stunts and done the things that you know nothing about I'm through, but I don't mention these things to any circular but I sure will if I have to, serve a notice on him by the authorities. Advise me at once by wire what your intentions are and after I make this a howling success you can sit down and deal with me in a very few minutes with a reasonable settlement. Now, this should be final. I get tired of writing, gnawing with every writing and fussing with everybody, when a person tries every way in the world to work for your interest and have turned down good propositions for no body but you. It's very disgusting. You have the last word and if Father Kessler don't want to help you, as you say he has to raise it for you, turn me loose and I'll raise it 'cause I think more of my word than any one I've ever found yet. I can't be nagged at day and nite and make you or anyone else any money.

Yours very truly,

PHILLIP SUETTER"

which said letter, when so placed and caused to be placed in the Post Office of the United States, then and there was enclosed in an envelope bearing uncanceled United States postage at the first class rate and the following return card, direction and address, to-wit:

“Mount Reuben Mines
Ajax :: California :: Hercules
P. O. Box 677
Grants Pass, Oregon

Francis J. Beckman
1105 Locust Street
Dubuque, Iowa”

and that the said person to whom the said letter and said envelope were so addressed was then and there one of said persons intended to be defrauded and whose money and property, according to said scheme and artifice, were to be obtained by means of the false and fraudulent pretenses, representations, and promises as aforesaid;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present: [18]

COUNT FIVE:

That said defendant, Phillip Suetter, hereinbefore named in the first count of this indictment, so having devised and employed the scheme and artifice to defraud described in the first count of this indictment, under the circumstances and conditions set out in the first count of this indictment, the allegations of which count descriptive of said circumstances, conditions, scheme and artifice, and of the connection of said defendant there-

with, being hereby incorporated in this count of this indictment by reference to the first count as if they were here repeated in full, did unlawfully, feloniously, wilfully and knowingly use a means of communication in interstate commerce in the sale of a security, to-wit: interests and units of the Suetter Placer Mines; that is to say, the defendant, as aforesaid, by the use of the facilities of the Western Union Telegraph Company, a means of communication in interstate commerce, did unlawfully, wilfully, feloniously and knowingly employ in the sale of a security as aforesaid the scheme and artifice to defraud as set forth in the first count of this indictment, the use of the facilities of the Western Union Telegraph Company, a means of communication in interstate commerce, being in the manner following, to-wit: the defendant on to-wit: the 29th day of September, 1940, at Portland, in the State and District of Oregon, and within the jurisdiction of this court, did knowingly, unlawfully, wilfully, fraudulently and feloniously send and cause to be sent a telegram, to be transmitted and delivered by the Western Union Telegraph Company in accordance with the direction and address thereon, said telegram being of the tenor following:

“1940 Sep 29 AM 12 32

PRA529 39 NT-Portland Org 28

Rev Stephen Bubahez—

923 West Ohio St Chgo—

Have Spent Six Thousand to Date Your

Sure Not Going to Let These Birds Take Forty Thousand Worth of Machinery for the Amount They Claim Better Fly Out Save it Wire Western Union Satisfied Five or Less Will Do Job—

PHILIP SUETTER." [19]

and that said person to whom said telegram was addressed was then and there one of said persons intended to be defrauded and whose money and property, according to said scheme and artifice, were to be obtained by means of the false and fraudulent pretenses, representations and promises, as aforesaid;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT SIX:

That said defendant, Phillip Suetter, hereinbefore named in the first count of this indictment, so having devised and employed the scheme and artifice to defraud described in the first count of this indictment, under the circumstances and conditions set out in the first count of this indictment, the allegations of which count descriptive of said circumstances, conditions, scheme and artifice, and of the connection of said defendant therewith, being hereby incorporated in this count of this in-

dictment by reference to the first count as if they were here repeated in full, did unlawfully, feloniously, wilfully and knowingly, in the sale of a security, to-wit: interests of the Suetter Placer Mines, by the use of the United States mails, employ said scheme and artifice to defraud, the use of the United States mails being in the manner following, to-wit: the defendant on or about the 27th day of July, 1939, the exact date being to the Grand Jurors unknown, did knowingly, unlawfully, wilfully, fraudulently and feloniously cause to be received at Grants Pass, in the State and District of Oregon, and within the jurisdiction of this Court, a certain letter, to-wit: a letter of the tenor following: [20]

“Green Bay, Wis.,
July 27th, 1939

Mr. Phillip Suetter,
Grant's Pass, Oregon.

Dear Mr. Suetter:—

In accordance with my promise given to you on the 3d of this month, I am transmitting to you, herewith, my check for the sum of two thousand dollars to apply on the Josephine Mine.

I know nothing of mining nor of the situation as it exists in Oregon but as a general proposition I am of the opinion that you should confine your efforts to bring one mine—the Josephine—into production and let everything else go. When you have done this and

returned to us who have supplied the cash, the amount of our investment, there will be time enough to give consideration to other prospects. I remember you saying that the Josephine has enough for us all. Good and well, adhere strictly to the terms of our Trust Agreement. Too many irons in the fire bring only grief as you probably know by this time.

I am writing frankly to you on this phase of the matter, for I have told you what my plans are and why I am somewhat anxious about the progress of your mining operations.

Kindly give yourself the trouble to send me my certificate for three units of the Suetter Placer Mines—two paid for by the present check and one by the check of May 8th, last.

Now let me hope that your last trip eastward proved successful enough to enable you to resume operations for good. I will await farther developments with much anxiety. A word now and then in regard to the progress that you are making will be greatly appreciated. It is discouraging to remain entirely in ignorance of what is going on.

Believe me with sincere good wishes,

Very truly yours,

PAUL P. RHODE

Bp."

which said letter, when so received, was then and there enclosed in an envelope, with postage fully prepaid thereon, addressed to Phillip Suetter,

Grants Pass, Oregon, a further description of which envelope is to the Grand Jurors unknown, and that the said person to whom the [21] said letter and envelope were so addressed was then and there the defendant herein;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT SEVEN:

That said defendant, Phillip Suetter, hereinbefore named in the first count of this indictment, so having devised and employed the scheme and artifice to defraud described in the first count of this indictment, under the circumstances and conditions set out in the first count of this indictment, the allegations of which count descriptive of said circumstances, conditions, scheme and artifice, and of the connection of said defendant therewith, being hereby incorporated in this count of this indictment by reference to the first count as if they were here repeated in full, did unlawfully, feloniously, wilfully and knowingly, in the sale of a security, to-wit: interests of the Suetter Placer Mines, by the use of the United States mails, employ said scheme and artifice to defraud, the use of the United States mails being in the manner following, to-wit: the defendant on or about the 25th day of August, 1939, the exact date being

to the Grand Jurors unknown, at Grants Pass, in the State and District of Oregon, and within the jurisdiction of this Court, did knowingly, unlawfully, wilfully, fraudulently and feloniously place and cause to be placed in the United States Post Office at Grants Pass, Oregon, for submission and delivery thereof by the Post Office Establishment of the United States according to the direction and address thereon, a certain letter, to-wit: a letter of the tenor following: [22]

“(Picture of Indian Girl) Phil Suetter,
President

Oregon Mining Investment Co., Inc.

Log Cabin

Graves Creek, Oregon

August 25th 1939

Most Rev. Paul P. Rhode,

Box 65

Green Bay, Wis.

Dear Bishop Rhode:

Have been trying to get time to write you since receiveing your letter and check, for which I wish to thank you again, but I have been very busy trying to get settled down since my return. Would have forwarded your units but all of my office equipment and records are packed in Portland. I am getting ready to open up on the Josephine and will have my office there and will forward the units in a very short time.

Used the check you sent me to purchase some equipment especially a new tractor as I had little luck in getting the use of the one on the California. You know that I was to have the use of the one turned over to the ArchBishop, but they seem to *hve* it busy all of the time. I did not want any trouble with Monsignor so deemed it advisable to buy one of my own.

I am making quite a few changes on my operation on the Josephine which will cost about seven thousand dollars but will result in a much cheaper operation and deliver more return per yard of ground worked. I am doing the very best I can with the amount of money available to work with.

There will be considerable expense conected with getting the property back in operation and in as much as it is up to you and myself to *darry* the load. I would appreciate another five thousand to purchase the equipment. I will carry the payroll. This will result in quick returns.

Will appreciate an early and favorable reply as I am very anxious to get the property in operation.

The Government is putting in a bridge which will help us to eliminate a great deal of trouble and expense.

Thanking you again for your help, I am,

Yours very truly,

PHILLIP SUETTER''

which said letter, when so placed and caused to be placed in the Post Office of the United States, then and there was enclosed in an envelope, with postage fully prepaid thereon, addressed to Most Rev. Paul P. [23] Rhode, Box 65, Green Bay, Wis., a further description of which envelope is to the Grand Jurors unknown, and that the said person to whom the said letter and said envelope were so addressed was then and there one of the said persons intended to be defrauded and whose money and property, according to said scheme and artifice, were to be obtained by means of the false and fraudulent pretenses, representations, and promises as aforesaid;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 23d day of May, 1942.

A TRUE BILL

/s/ ARNOLD S. ROTHWELL
Foreman, United States
Grand Jury

CARL C. DONAUGH
United States Attorney

/s/ J. MASON DILLARD
Assistant United States
Attorney

Filed in open Court this 23rd day of May, A. D. 1942. G. H. Marsh, Clerk. By R. DeMott, Deputy Clerk.

Bail \$10,000.

CARL C. DONAUGH

United States Attorney

J. MASON DILLARD

Assistant U. S. Attorney [24]

And Afterwards, to wit, on Wednesday, the 15th day of July, 1942, the same being the 9th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [25]

July 15, 1942

No. C-16073

UNITED STATES OF AMERICA

vs.

PHILLIP SUETTER

INDICTMENT:

Sec. 338, Title 18, and Sec. 77q (a) (1), Title 15,
United States Code.

RECORD OF PLEA OF NOT GUILTY

Now at this day comes the plaintiff by Mr. J. Mason Dillard, Assistant United States Attorney,

and the defendant, above named, in his own proper person and by Mr. William J. Prendergast, Jr., of counsel. Whereupon the said defendant is duly arraigned upon the indictment herein, and for plea thereto states that he is not guilty as charged therein. [26]

And Afterwards, to wit, on the 9th day of September, 1942, there was duly Filed in said Court, a Verdict in words and figures as follows, to-wit: [27]

[Title of District Court and Cause.]

VERDICT

We, the Jury duly impaneled and sworn to try the above-entitled cause, do find the defendant, Phillip Suetter,

Not Guilty . . . as charged in Count One of the Indictment herein;

Not Guilty . . . as charged in Count Two of the Indictment herein;

Guilty . . . as charged in Count Three of the Indictment herein;

Guilty . . . as charged in Count Four of the Indictment herein;

Not Guilty . . . as charged in Count Five of the Indictment herein;

Guilty . . . as charged in Count Six of the Indictment herein; and

Guilty . . . as charged in Count Seven of the Indictment herein.

Dated at Portland, Oregon, this 9th day of September, 1942. 8:16 P.M.

SPENCER W. ALEXANDER

Foreman

May the jury respectfully request leniency for the defendant.

Signed

S. W. ALEXANDER

[Endorsed]: Filed September 9, 1942. [28]

And Afterwards, to wit, on the 8th day of October, 1942, there was duly Filed in said Court, a Motion for New Trial, in words and figures as follows, to wit: [29]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, Phillip Suetter, by and through his attorneys, W. J. Prendergast, Jr., and David Weinstein, and respectfully petitions the Court for a new trial, on the following grounds and for the following reasons:

I.

The verdict of the jury, in finding the defendant guilty on counts numbered: Three, Four, Six and Seven of the indictment, said counts charging the defendant with having violated Section 77q (a) (2) of Title 15 U.S.C.A. (Securities Act) is inconsistent with their finding that the defendant was not guilty of having violated Section 338 of Title 18, U.S.C.A. (Mail Fraud Act).

POINT 1.

The jury by its verdict found that the defendant, Phillip Suetter, was not guilty of "using the mails in furtherance of a scheme, or artifice to defraud," but did find that defendant was guilty of having used the mails to sell securities in interstate commerce in furtherance of a scheme or artifice to defraud. Having by their verdict in the first instance found that the defendant was not guilty of the Mail Fraud charges, Counts One and Two of said indictment, they found, on the same evidence that defendant did use the mails in furtherance of a scheme or artifice to defraud, in the sale of securities.

In order to sustain a conviction of the defendant on any of the Counts of said indictment, it was necessary that the jury find, in the first instance, that there was some scheme or artifice to defraud. Under both Section 77q of Title 15 U.S.C.A. and Section 338 of Title 18, U.S.C.A. there must be some scheme to defraud.

The Courts have held that there is no inconsistency in a finding by a jury that there has been no violation of the Mail Fraud Statute, but that there had been [30] a violation of the Securities Act. However, defendant contends that in this case the verdict of the jury is inconsistent, not because of the findings of guilt, but because said findings of guilt were based on exactly the same evidence that was introduced to prove a violation of the Mail

Fraud Statute upon which defendant was found
“not guilty.”

/s/ W. J. PRENDERGAST, JR.

/s/ DAVID WEINSTEIN

Attorneys for Defendant

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing Motion
for New Trial is hereby admitted in Multnomah
County, Oregon, this 8th day of Oct. 1942.

/s/ J. MASON DILLARD

of Attorneys for United
States.

[Endorsed]: Filed October 8, 1942. [31]

And Afterwards, to wit, on Monday, the 19th day
of October, 1942, the same being the 90th Judicial
day of the Regular July 1942, Term of said Court;
present the Honorable Leon R. Yankwich, United
States District Judge for the Southern District of
California, presiding, the following proceedings
were had in said cause, to wit: [32]

[Title of District Court and Cause.]

October 19, 1942

Indictment:

Sec. 77q (a) (1), T. 15, and Sec. 338, T. 18,
U. S. C. A.

ORDER DISMISSING COUNTS THREE
AND FOUR

Now at this day comes the plaintiff by Mr. J. Mason Dillard, Assistant United States Attorney, and Mr. Charles E. Wright, Attorney for the Security and Exchange Commission, and the defendant, above named, in his own proper person and by Mr. Wm. J. Prendergast, Jr., and Mr. David Weinstein, of counsel; whereupon, this cause comes on for a further hearing upon the motion of said defendant for a new trial upon Counts Three, Four, Six and Seven of the indictment herein; and the Court having heard the arguments of counsel and being fully advised in the premises,

It Is Ordered that said motion as to Counts Three and Four of the said indictment be, and the same is hereby, allowed; and it appearing to the Court from the records in this cause that there was not sufficient evidence to sustain a verdict of guilty as to Counts Three and Four, it is ordered that said counts be, and each of the same is, hereby dismissed.

It Is Further Ordered that the said motion be, and the same is hereby, denied as to Counts Six and Seven of said indictment. [33]

And Afterwards, to wit, on Monday, the 19th day of October, 1942, the same being the 90th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Leon R. Yankwich, United States District Judge, for the Southern District of California, presiding, the following proceedings were had in said cause, to wit: [34]

In the District Court of the United States
for the District of Oregon

October 19, 1942

No. C-16073

UNITED STATES OF AMERICA

vs.

PHILLIP SUETTER,

Defendant.

Indictment:

Sec. 77q (a) (1), T. 15, and Sec. 338, T. 18,
U. S. C. A.

SENTENCE

Now at this day comes the plaintiff by Mr. J. Mason Dillard, Assistant United States Attorney, and Mr. Charles E. Wright, Attorney for the Security and Exchange Commission, and the defendant, above named, in his own proper person and by Mr. Wm. J. Prendergast, Jr., and Mr. David Weinstein, of counsel; and it appearing to the Court that the said defendant has been heretofore found guilty

by the verdict of a jury, of the offenses charged in Counts Six and Seven in the indictment herein,

It Is Adjudged by the Court that the said defendant, Phillip Suetter, is guilty of the offense of unlawfully, feloniously, wilfully and knowingly, in the sale of a security, to-wit: interests of the Suetter Placer Mines, by the use of the United States mails, employ a scheme and artifice to defraud, by causing to be received at Grants Pass, in the State and District of Oregon, and within the jurisdiction of this Court, a certain letter dated July 27, 1939, addressed to Mr. Phillip Suetter, Grants Pass, Oregon, as charged in Count Six of the indictment; that he is guilty of the offense of unlawfully, feloniously, wilfully and knowingly, in the sale of a security, to-wit: interests of the Suetter Placer Mines, by the use of the United States mails, employ a scheme and artifice to defraud, by placing in the Post Office of the United States at Grants Pass, Oregon, for submission and delivery thereof by the Post Office Establishment of the United States according to the direction and address thereon, a certain letter dated August 25th, 1939, addressed to Most Rev. Paul P. Rhode, [35] Box 65, Green Bay, Wis., as charged in Count Seven of the indictment.

Whereupon, the said defendant, waiving time for passing of sentence for the offenses charged in Counts Six and Seven of the indictment, is asked if he has anything to say why sentence should not now be pronounced against him, and no sufficient cause being shown,

It Is Further Adjudged that the said defendant, Phillip Suetter, be imprisoned for a term of Two and one-half years for the offense charged in Count Six of the indictment herein; that he be imprisoned for a term of Two and one-half years for the offense charged in Count Seven of the indictment herein; that said terms of imprisonment run concurrently, a total sentence of Two and one-half years, and that said defendant be committed to the custody of the Attorney General of the United States or his authorized representative, who will designate the place of confinement of said defendant, and that said defendant stand committed until this sentence be performed or until he be otherwise discharged according to law.

Whereupon, It Is Ordered that said defendant, Phillip Suetter, be taken into custody by Mr. Fred H. Norman, a bailiff of this Court, to be by him delivered to the United States Marshal for the District of Oregon, and that upon his being received by the United States Marshal for the District of Oregon, the bond given by said defendant for his appearance, at this time be, and the same is hereby exonerated from further liability in this behalf.

Dated at Portland, Oregon, this 19th day of October, 1942.

LEON R. YANKWICH
Judge

[Endorsed]: Filed October 19, 1942. [36]

And Afterwards, to-wit, on the 23rd day of October, 1942, there was duly Filed in said Court, a Notice of Appeal, in words and figures as follows, to wit: [37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the above entitled defendant and respectfully files this, his Notice of Appeal, and in conformity with the rules of the Court, gives the following information:

1. The name of the Appellant is Phillip Suetter, and his address is City of Portland, County of Multnomah, State of Oregon.

2. The names of the Appellant's attorneys are William J. Prendergast, Jr. and David Weinstein, 314 Spalding Building, Portland, Oregon.

3. The defendant was tried and convicted of violation of two counts, charging violation of Section 77q (a) (2) of Title 15 U.S.C.A. (Securities Act).

4. The date of the entry of the Judgment was October 19, 1942.

5. The judgment sentences the defendant to serve a period of two and one-half years in an institution to be selected by the Attorney General of the United States upon each of the counts upon which the defendant was convicted, said sentences to be served concurrently.

6. The defendant, at this time, is confined in the County Jail of the County of Multnomah, City

of Portland, State of Oregon, in the custody of the United States Marshal for the District of Oregon.

I, the above named Appellant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

(Signed) PHILLIP SUETTER,
Appellant.

Dated at Portland, Oregon, this 23rd day of October, 1942. [38]

GROUND OF APPEAL

Point 1.

No Evidence to Sustain Verdict, and Verdict Inconsistent With Facts

The jury by its verdict found that the defendant, Phillip Suetter, was not guilty of "using the mails in furtherance of a scheme, or artifice to defraud," but did find that the defendant was guilty of having used the mails to sell securities in interstate commerce in furtherance of a "scheme or artifice to defraud." Having by their verdict in the first instance found that the defendant was not guilty of the Mail Fraud charges, (having found no scheme to defraud) Counts One and Two of said indictment, they found, on the same evidence that the defendant did use the mails in furtherance of a scheme or artifice to defraud in the sale of securities.

Point 2.

Court's Refusal to Require the United States to Designate Counts Toward Which Evidence Was Directed.

In the case at Bar, timely objection was made to the introduction of certain evidence and motions to have the evidence limited to certain counts in the indictment. This Court failed to have any of the evidence introduced by the United States confined to any certain count, or group of counts in the indictment, and allowed all the evidence, over objection by the defendant, to be introduced as showing a general scheme or artifice to defraud on the part of the defendant. Thus the same evidence was submitted to the jury to prove a violation of the Mail Fraud Counts of the indictment, and also a violation of the Security Act Counts of the indictment. The jury could not consistently find that there had been no violation of the Mail Fraud Counts, requiring some scheme or artifice to defraud, and use of the mails, and a violation of the Securities Act Counts, requiring some scheme or artifice to defraud, by use of the United States Mails, under precisely that same evidence, and it was error by the Court to allow such evidence to be admitted over the defendant's objection to prove a general scheme or artifice to defraud. [39]

Point 3.

Court's Refusal to Direct a Verdict.

Defendant having moved at the end of the Government's case for a directed verdict and renewed

the same at the end of the trial, the Court, in both instances, refused to direct a verdict in favor of the defendant. Defendant contends that there was no evidence upon which the jury could have a verdict of guilty of violation of Section 77q (a) (2) of Title 15, U.S.C.A. (Securities Act); as in both instances, the basis of the violation of the Acts is some scheme or artifice to defraud, and in the absence of such scheme or artifice to defraud, there can be no crime .

State of Oregon,
County of Multnomah—ss.

Due and legal service of the foregoing Notice of Appeal is hereby admitted in Multnomah County, Oregon, this 23rd day of October, 1942.

CARL C. DONAUGH,

United States District Attorney.

By WILLIAM H. HEDLUND,
Deputy.

[Endorsed]: Filed October 24, 1942. [40]

And Afterwards, to wit, on Saturday, the 24th day of October, 1942, the same being the 95th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Leon R. Yankwich, United States District Judge for the Southern District of California, presiding, the following proceedings were had in said cause, to wit: [41]

[Title of District Court and Cause.]

ORDER ALLOWING BAIL AND SETTING
BOND

The above entitled matter having come on before the Court on this 24th day of October, 1942, upon the application of the defendant, Phillip Suetter, through his attorneys, W. J. Prendergast, Jr. and David Weinstein, and the defendant having on the 23rd day of October, 1942, duly filed his Notice of Appeal, and

It Appearing to the Court that said Notice of Appeal and Grounds of Appeal raises substantial questions of law to be determined by such appeal,

It Is Therefore Ordered, Adjudged and Decreed that pending said appeal the execution of the judgment be stayed, and

It Is Further Ordered, Adjudged and Decreed that the defendant, Phillip Suetter, be released upon bail upon his filing of an undertaking of a surety company in the sum of Ten Thousand and no/100 (\$10,000.00) Dollars, said bond to be approved by any Judge of the above entitled Court or the United States Commissioner.

Dated this 24th day of October, 1942.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed October 24, 1942. [42]

And Afterwards, to wit, on Saturday, the 31st day of October, 1942, the same being the 101st Judicial day of the Regular July, 1942, Term of

said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [43]

[Title of District Court and Cause.]

October 31, 1942.

Section 77q (a)(1). Title 15, and Section 338,
Title 18, U.S.C.A.

ORDER RELEASING DEFENDANT ON BOND

Now at this day comes the defendant by Mr. William J. Prendergast, Jr., and presents to the Court a bond in the sum of \$10,000, which is duly approved by the Court and It Is Ordered that said defendant be released from custody. [44]

And Afterwards, to wit, on the 14th day of April, 1943, there was duly Filed in said Court, a Praecipe for transcript in words and figures as follows, to wit: [45]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

Please prepare transcript on appeal to include:

1. Indictment.
2. Plea.
3. Verdict.
4. Motion for New Trial.
5. Order on Motion for New Trial.
6. Sentence.

7. Notice of Appeal.
8. Order Fixing Bail Pending Appeal.
9. Order Staying Execution of Judgment and releasing on Bail.
10. Praeipe for transcript of Record.

DAVID WEINSTEIN,

Of Attorneys for Appellant.

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing Praeipe is hereby admitted in Multnomah County, Oregon, this day of April, 1943.

J. MASON DILLARD,

Of Attorneys for Appellee.

[Endorsed]: Filed April 14, 1943. [46]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 46 inclusive, contain a transcript of the matters of record in said court pertinent to the appeal and as designated in the praecipe for transcript filed by the appellant in a criminal case in said court numbered C-16075, in which the United States of America is plaintiff and appellee and Phillip Suetter is the defendant and appellant; that I have

compared the foregoing transcript with the original thereof and that the same is a full, true and correct transcript of the said record and proceedings had in said court in said cause in accordance with the rules and praecipe for transcript filed in said cause by said appellant.

I have annexed to and I am transmitting with the said transcript the original Assignment of Errors and the original Bill of Exceptions filed in said cause by said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 15th day of April, 1942.

[Seal]

G. H. MARSH,
Clerk. [47]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. C-16-073

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BILL OF EXCEPTIONS ON BEHALF OF THE
DEFENDANT IN THE ABOVE ENTITLED
CAUSE.

Be it remembered that heretofore the grand jury of the United States in and for the District of Ore-

gon did find and return to and before the above entitled Court its indictment against the defendant, Phillip Suetter, and that at the fall term of the District Court of the United States for the District of Oregon, the defendant named above, upon being arraigned, appeared in person and entered his plea of Not Guilty to all the charges contained in said indictment.

Thereafter, on the 31st day of August, 1942, the above cause came on for trial before the Hon. Leon R. Yankwich, one of the judges of said Court, and a jury duly impaneled, J. Mason Dillard, and Charles E. Wright, appearing as counsel for the United States, and W. J. Prendergast, Jr. and David Weinstein appearing as counsel for the defendant.

The United States, to maintain its case, called as a witness

MR. RALPH T. MONTAG,

one of the persons alleged in the indictment to have been defrauded, who testified that he had known the defendant, Phillip Suetter, about 15 years; that he became acquainted with the defendant, Suetter, in North Portland, Oregon, where they were both engaged in business; that he, Montag, had had invested some \$5,000 with the defendant Suetter in 1934, in the mining business in Southern Oregon.

There was offered in evidence, after identification by the witness, Government Exhibit I for identification, a letter dated February 12, 1934, addressed to the witness Montag and signed by the

(Testimony of Ralph T. Montag.)

defendant Suetter, the material parts of which are as follows:

“Dear Sir: I have an option on the George Brothers Claim in Josephine County, state of Oregon. Before exercising this option it is necessary that some prospecting be done, and it should not cost to exceed \$250.00.

“For said money advanced by Ralph Montag if this option is exercised and approved, it is to be a 50-50 proposition; Money is to be repaid of the proceeds of claims.

“If when the prospecting work is done we determine to exercise our option, it will require the payment of \$1,000 on the exercise of the option and the balance in accordance with the terms of the option.” [1*]

To the admission of said Exhibit I the defendant, by his counsel, then and there objected, on the grounds and for the reason that the said Exhibit I was incompetent, and on the further ground and for the further reason that the United States should be compelled to elect, or designate, as to which charge, or charges, in the indictment the Exhibit was directed, whether to the mail fraud counts or to the securities counts, which said objection was then and there over-ruled and an exception allowed.

The witness, Montag, testified that Government's Exhibit I was one of the first communications he had received from the defendant Suetter in regard

*Page numbering appearing at foot of page of original Bill of Exceptions.

(Testimony of Ralph T. Montag.)

to the Josephine mines and further identified Government's Exhibit 2,—a letter dated February 12, 1934, from the defendant, Suetter, to the witness Montag, the material portions of which are as follows:

“Mr. Ralph Montag, City. Dear Sir: I have an option on eleven placer claims in Josephine County, Oregon, with 1200 feet of pipe, a #1 Giant, two cabins, together with all equipment on the premises for \$8,000.

“I have 60 days to prospect this property, which requires \$250.00 for grub powder etc. If said option is approved and exercised, \$1,000 is to be paid and after the first year \$2,000 is to be paid, and the balance of \$3,000 is to be paid at the end of the 3rd year and receive deed for same.

“In consideration for certain sums to be advanced by you to gain control of the above optioned eleven placer claims not to exceed \$175.00 you are to receive one-half interest of all net recovery of same.

“You are also to receive one-half interest in any other claims that may be financed and operated at both our expenses.”

To the admission of said Exhibit 2 the defendant, by his counsel, then and there objected, on the grounds and for the reason that the same was irrelevant, immaterial and incompetent, and on the further grounds and for the further reason that the United States should elect or designate as to which

(Testimony of Ralph T. Montag.)

count or counts in the indictment the evidence was directed, based on the decision in the case of the United States vs Jarvis 90 Fed (2) 242. The Court over-ruled the objection by the defendant and an exception was allowed.

The witness testified in regard to Government Exhibit 2 that he had received the letter in the ordinary course of the mails and understood that it related to the placer claims called the Josephine claims and identified Government Exhibit 3, a letter dated June 4, 1934 from the defendant Suetter to the [2] witness Montag the material portions of which are as follows:

“Dear Ralph: I am enclosing herewith a statement of our operation as of June 1, showing the expenditures made up to that time.

“You will note we have spent \$7,610.00 for equipment, which includes the shovel, cletrac, International trucks, bulldozer, forge, welding outfit and numerous other tools which are necessary for an operation of this nature.

We have 12 men on the payroll, all good men, nearly all working for \$1.00 a day and their board, and in that connection will state that we are giving them good meals at a cost of 45c per day per man. I find that meat is cheaper here than in Portland.

“Everything is now on the property, the men are busy building the washer frame for the revolving screen.

“We should be in production now but owing

(Testimony of Ralph T. Montag.)

to delays in getting the road grader and also in not having the bulldozer sooner we have been held up and again I repeat I must be here on the job day and night. Am moving the cook house and all to the mine today.

“I need some more money and can’t leave the job as every time I leave it sets us back 3 or 4 days.

And attached to the letter the following:

“Cash paid out in June 1934; General operating expense, \$273.11; groceries and meat \$188.70; Gas and oil \$329.39; repairs and maintenance \$230.75; lumber \$683.61; William George \$5,400.00; wages \$632.50; total \$7,735.60. Cash received during the month of June 1934, Ralph Montag \$350.00; Ralph Montag \$7,500.00; total \$7850.00”

To the admission of said Government’s Exhibit 3, the defendant, by his counsel, then and there objected on the grounds and for the reasons that the same was irrelevant, immaterial and incompetent and on the further ground and for the further reason that the United States should be compelled to elect or designate as to which count or counts in said indictment the evidence was directed. The Court overruled the objection and allowed an exception.

The witness Montag, referring to Government’s Exhibit 3, testified that he had disbursed between seven and eight thousand dollars for the operation

(Testimony of Ralph T. Montag.)

of the mines; that the mine was in operating condition and that he expected a "clean up" in the 1934-35 season; that there had never been any "clean-up" on the properties as far as he knew.

After identification by the witness, the United States offered Government's [3] Exhibit 4, a note for the sum of \$7,500 dated June 23, 1934, to the Grant's Pass and Josephine Bank, signed by the witness, Ralph T. Montag, to the admission of said Government's Exhibit 4, defendant by his counsel, then and there objected on the ground and for the reason that the same was immaterial, irrelevant and incompetent to the issues of the case, which said objection was then and there overruled and an exception allowed.

The witness Montag testified that Government's Exhibit 4 was a promissory note in the sum of \$7,500.00, executed by the witness, and Phillip Suetter, payable 90 days after date to the Grant's Pass and Josephine Bank.

The United States offered Government's Exhibit 5, a promissory note in the sum of \$2,000.00 dated July 10, 1934, payable in 90 days, to the Grants Pass and Josephine Bank, signed by the defendant Suetter and the witness Montag to the admission of which the defendant by his counsel, then and there objected, on the grounds and for the reason that the same was irrelevant, immaterial, and incompetent, which objection was overruled and an exception allowed.

(Testimony of Ralph T. Montag.)

The witness Montag further identified Government's Exhibit 6, a promissory note for \$10,000.00 signed by the defendant Suetter at Grants Pass, Oregon, dated June 29, 1934, and attached to a mortgage on mining claims, and running in favor of the witness Montag covering the following described property.

"The Hunt and George Mine, located by W. D. Hunt and W. D. George; 'The Mud Flat Placer Claim;' The Whiteside No. 2 placer mining claim; The Watts Extension No. 1 placer claim containing 10 acres more or less; The Stockbarger placer claim and The Battle Bar placer claim."

To the admission of said Government's Exhibit 6, defendant by his counsel then and there objected on the ground and for the reason that the same was irrelevant, immaterial and incompetent, which objection was overruled and an exception allowed.

The witness testified that he had had conversation with the defendant, Suetter, about the property described in the real estate mortgage; that the defendant Suetter always referred to this property as the Josephine property; that the note had never been paid nor the mortgage satisfied and that the obligation was still a legal and subsisting obligation from the defendant Suetter to the [4] witness Montag.

The witness further testified, concerning Government's Exhibits 4 and 5, that those notes had not

(Testimony of Ralph T. Montag.)

been paid; and that both the obligations covered by Exhibits 4 and 5 and 6 were still unpaid.

The United States then offered in evidence, after identification by the witness Montag Government's Exhibit 7, a letter dated September 23, 1936, addressed to the witness, Montag, and signed by the defendant, Suetter, the material portions of which are as follows:

"Ralph Montag, 2011 N. Columbia Blvd.

"Dear Friend: Just received your letter and will try and answer in full. First the deal has been made with the Bishop. We hold papers to that effect signed by him. He was to turn in a large amount of securities to be sold; also he has several hundred thousand dollars worth of oil paintings which are being sold and have heard that considerable amount have already been sold. In the Bishop's first plan he was drawing the money out of the general church fund.

"I hope this letter explains all details. I do not want to and do not think it good policy to ask the Bishop or any of the others for any money at this time until the first payment is at hand. When I wrote you what I really needed is \$2000.00 but I cut it in half and asked for only \$1,000.00. At the final end we will have to make a trip to Iowa with several of the Fathers most any day with running expenses before your check came and with future expenses also above trip to Iowa I am in great

(Testimony of Ralph T. Montag.)

need of other \$500.00. I hope this letter explains all details and please understand that the above agreements are in writing and duly signed and are held by us. Please do not delay check as do not want to be held up for the want of expense money. Check today went for previous expenses. Answer by air. Will return large part of your investment from first payment.

Yours truly,

PHILLIP SUETTER."

The witness testified that he had received Government's Exhibit 7 in the ordinary course of mail at or about the time it was dated.

The United States then offered in evidence Government's Exhibit 8, a letter dated August 4, 1936, from the defendant Suetter to the witness Montag, the material portions of which are as follows:

"Dear Friend: I landed Chicago morning of 17th. Met E. H. at Palmer House. Had quite talk. Told me the set up and showed all letters received from different men of [5] group. I find very clean deal and square, which we have nothing to worry about whatever. This deal is made which you have got nothing to fear that you will not be responsible or liable for anything. Your name is not mentioned in any way. I come to the conclusion the fathers' deal is little slower but sure and no grafting.

"Now Ralph, I can see why this deal was

(Testimony of Ralph T. Montag.)

slowed up for lack of expense money which no doubt we should have furnished it. In checking up on him I find that he is in the hole almost \$500.00. In April when we received wire from E. H. as you know the father was ready to pay \$10,000.00 and business manager and other fathers wanted to leave at once for the mine. E. H. has proven to me that \$10,000.00 would not make the set that they would expect to see. Their first money will be \$25,000.00 or better. As soon as this first money is turned over to us I am leaving for the mine and E. H. will stay gathering more money till I get the outfit ready for him to leave. I will wire. By that time be plenty of water. They can't stay only four five days. I have got to have things ready and in shape when they arrive at the mine. I hope you have had a good trip. I am having a hard time for expense money. This bill of E. H. should be paid. I would hate for anything to happen because the deal is made.

“Please answer. Phil”

The witness, Montag, testified that he had received Government Exhibit 8 in the ordinary course of mail.

The United States thereupon offered Government Exhibit 9, a letter dated November 1, 1934, addressed to the witness, Montag, and signed by the defendant, Suetter, the material portions of which are as follows:

(Testimony of Ralph T. Montag.)

“Friend: Got in last night 12:20. Looked at my mail. Find I am overdrawn at the bank. River has come up; that we had to bring giants and my lumber over on cable. I am going look at 2 hoists in morning. I have got to have them to keep boulders out. We can’t afford to move boulders with giants, put through ten yards of dirt while you are moving one boulder. Rain is not stopping me. Too valuable dirt to move Boulders with water. I am going to put 3,000 yards a day through outfit. My intention is to get every dollar of our money out 60 days from start. We start last of next week. I am buying \$3,000.00 equipment for about \$500.00. I got to have 1,000 feet of pipe. I am looking at some tomorrow. Hustle them fellows up on the screen; got to have it.

Yours truly, Phillip Suetter”.

Dated November 1, 1934.

Referring to Government Exhibit 9, the witness testified he had received the same in the ordinary course of mail at or about the time it was dated.

The United States then offered in evidence Government Exhibit 10, a letter [6] dated September 30, 1936, from the defendant Suetter to the witness Montag, the material portions of which are as follows:

“Dear Friend: Your letter recieved this A. M. and small check enclosed. I can’t understand that this matter is a puzzell to you, but I am writing to get you all straight. I am not

(Testimony of Ralph T. Montag.)

wanting to tell you that you get \$329,000.00 in return. That was a little error that the stenographer made. It is \$320,000.00 for 49%. Now get that right. And I am not trying to make you believe that that's what you get in return. I only told you what the Bishop is buying—49% of the property. Then went on and explained just how the deal is to be made.

“now then it is all useless for you to talk about a deal of this kind. You know you might pull that stuff in a town like Portland, and you may be able to say that to people that have been on this ground, and have tested—but here are people that have never seen the ground and have never questioned what Hogan has told them.

“Since writing you I had Hogan call up the Bishop on Monday. The Bishop said he was sorry he had delayed him, but he is coming here tomorrow. The deal is just as I told you it going to be—from \$25,000.00 to \$100,000.00 is what it sounded like to Hogan, but the money has got to clear through the Portland Bank.—now get this into your head. And further I have stepped on Hogan, and it has brought it to a head.

“This \$250.00 that you sent me I got this morning is not going to get me anywhere, so above all you will have to send me that much more to get by at all.

“My reason for wanting to get this over to

(Testimony of Ralph T. Montag.)

you is that I don't want you to spring a letter on me or to get the idea that we are going to get \$329,000.00 but only \$320,000.00.

"Now send me the balance of this \$1,000.00 without fail and I will return you all the moneys you advanced for this trip as soon as I get back to Portland with said check."

"(Signed) PHILLIP SUETTER."

The United States then offered in evidence Government's Exhibit 11, a promissory note dated January 6, 1941, for \$9,500 payable 6 months after date, to the U. S. National Bank of Portland, signed by the witness, Ralph T. Montag.

The United States also offered in evidence its Exhibit 12, a carbon copy of a letter dated September 28, 1936, from the witness Montag to the defendant, Suetter, the material portions of which are as follows: [7]

"Dear Phil: I was very much surprised to learn over the phone that you had not seen the Bishop as you stated when you left Portland that you would see the Bishop and get the money and be back in Portland in about three weeks. It has been considerable longer than three weeks and you advise me that you have not seen him and that you are still waiting for E. H. "--to make good just as you were in Portland." "In your letter you do not state when you are to get the money and in your phone conversation you did not know but thought it might take two weeks longer. Now

(Testimony of Ralph T. Montag.)

you might as well know it now that I am just as hard up as you and Hogan and this writing and phoning me for money is of no use as I keep expecting money from you and instead of getting it to help me out I keep getting calls from you. I have not the money to send you and you must believe that. I am hard up myself. You seem to think that I do not have to make money and can keep on writing checks indefinitely.

“When you left here I gave you all I could spare and have since scraped up \$500.00 and sent to you and thought that I had surely done more than my part for you and Hogan to whom I feel no obligation whatsoever. It is useless to keep reminding me that I am to send \$1,000.00.

“You can act as you see fit in Chicago, but it seems to me that I would tell Hogan and The Bishop that you had to have that money at once and that you were returning to Portland at once and that the deal was off and you would raise the money in Portland. This might cause them to quit stalling and make a real effort to make good with something besides promises. Please do not wire, write or phone me for more money as it cannot be had. As mentioned above I have not got it. So govern yourself accordingly.”

Government's Exhibit 13, a copy of a letter dated November 3, 1930, from the witness, Montag, to the

(Testimony of Ralph T. Montag.)

defendant, Suetter, together with a telegram dated November 3, 1936, from the defendant, Suetter, to the witness, Montag, the material portions of which are as follows:

Mr. Phillip Suetter at The Stevens Hotel, Chicago, Ill., signed by Ralph T. Montag.

“I received a telegram from you today reading as follows:

“Bishop here last night for one hour between trains. Have date to meet in Detroit for final financial settlement. Expect to return home after settlement. Please wire as requested five. Do not fail me as this will be final!

“Signed PHILLIP SUETTER

“I am enclosing herewith my check for \$500.00 per above with the understanding that you are now making a real financial settlement with the Bishop along the lines you have been writing and wiring me about. If you are not making such a financial settlement do not [8] use this check but return it to me. I have had to do some real work to get this money and do not want it used if you are not making the deal as suggested in your former letters and wires.

“The reason I am compelled to take such action is that for the past year or more you have been assured by you and Hogan that the deal was made and then it turned out it was not made and I want no more of such misleading actions or promises that are not made good.

(Testimony of Ralph T. Montag.)

I do not want to appear as calling down or in any way finding fault with you personally but I sure do not want to be mislead any more nor will I be. Your telegram states that 'This will be final' which I understand to mean just what it says and that now you will be sending the financial settlement to the First National Bank of Portland for adjustment upon your arrival.

"If this above is not in accordance with what you intend to do please do not cash this check as the check is all sent in accordance with your wire.

"With best wishes and trusting that your deal will be just what you wanted and worked hard to get, I remain, Yours truly."

Government's Exhibit 14, a letter dated June 6, 1937, from the defendant, Suetter, to the witness, Montag, as follows:

Hotel Julien, Bebuque, Dubuque, Iowa.

"Ralph T. Montag"

"Dear Friend: Sunday morning arrived here. Had appointment with Archbishop but he will not arrive until 3 P. M. so am going to try write to you a few lines again with plenty of time.

"I mailed you a lot of papers this A. M. but—and done in a hurry, but at that I answered all your questions, or, rather gave you facts of Mrs. Hill. Now then, that kind of gossip as

(Testimony of Ralph T. Montag.)

you call it, has existed for me continually for me ever since I was in Southern Oregon but I never told you or least wanted to bother you because there is not many can take it.” “I am going—So I am going to see Bishop at 3 P. M. today, then going to Chicago, then to Marion, Indiana, then back to Crown Point, then Indianapolis, then Cincinnati, to St. Louis, then on my way home. In this round I expect to sell quite a few of these notes and few units. I am not working very hard on units till I get this first set up going. Then I got few people has got real money and invite them out but your name doesn’t appear nowhere, only between ourselves, and you can rest assured it’s going to be done in honest upright way and no after”—“and it will be highest ever hit Southern Oregon when I get done, and won’t be long but it takes time and money and knowing how, and this is not weak sister’s job or no slicker’s job either, but just have faith in God and, all mighty—in God all mighty and holy family.” “Just have faith in God all [9] mighty and holy family.

“Yours truly PHILLIP SUETTER.”

Government’s Exhibit 15, “Suetter Placer Mines Trust Agreement” dated January 30, 1937, signed Phillip Suetter, trustee, Francis J. Beckman, as follows:

“This trust agreement, dated the 2nd. day

(Testimony of Ralph T. Montag.)

of January, A. D. 1937, is to certify that Phillip Suetter, of Portland, Oregon, hereby declares that he has taken title, as Trustee, to the mining claims on the following described real estate:

“1. The Hunt and George Mine, located by W. D. Hunt and W. D. George;

2. The Mud Flat placer claim, located by Alex George containing twenty acres;

3. The Whitesides #2 placer mining claim containing 140 acres;

4. The Watts Extention #1 placer claim containing 10 acres;

5. The triangle placer claim, containing about 8 acres;

6. The Stockbarger placer claim, formerly held by John Stockbarger;

7. The Battle Bar placer claim;

8. The Missing Link placer claim, located by W. D. George and Alex George;

“Together with all ditches, ditch rights, water and water rights appurtenant to the said mining property or any part thereof, and all right, title, and interest of any of the undersigned grantors therein and thereto, together with all buildings and improvements, machinery or mining equipment, of whatsoever nature now being upon said mining ground.

“That it is deemed and declared by the said Trustee that all of said mining claims on the property hereinbefore described shall consist of 800 undivided units; that he proposes to sell

(Testimony of Ralph T. Montag.)

not to exceed 350 of said 800 undivided units and to retain the balance for himself as an individual beneficiary; that the said Phillip Suetter as trustee, shall have the management and control of said property and the selling, mining and operation thereof; that from the income thereof, he shall pay all taxes or assessments levied against the property, insurance, cost of improvements, repairs and maintenance, and shall account to the unit holders hereunder at the end of each calendar year; that he shall keep a true and accurate set of books and accounts showing the income and disbursements of the trust, and for his services in the management of the trust and the operation of said property, the said Phillip Suetter shall receive a monthly salary or compensation of \$250.00 payable out of the income of said trust.

“It is understood and agreed between the Trustee hereunder and all parties who may become unit holders hereunder, that the Trustee is to sell not to exceed 350 undivided units [10] out of the total of 800 undivided units; that the proceeds from the sale of said 350 undivided units, or any part thereof, shall be used solely for the purchase of necessary machinery and equipment to enable the Trustee to conduct the mining operations on said property, and also to operate the said mines on said property. In the event the Trustee sells any units over and above 350, the proceeds from the sale of the

(Testimony of Ralph T. Montag.)

additional units may be retained by the said Phillip Suetter, individually.

“It is understood that for each \$1,000.00 paid to said Trustee, by any person, firm or corporation, under the terms and conditions of this trust, the Trustee will issue to said person, firm or corporation making said payment, a certificate of ownership for one undivided unit in said trust, which certificate is to be signed by the Trustee hereunder, and be subject to the terms and conditions herein contained.

“It is understood and agreed between the parties hereto and by any person, firm or corporation who may be entitled to any interest under this trust, that for each undivided unit hereof owned by any person, firm or corporation, said person, firm or corporation shall be entitled to 1/800ths of the net profits or net income thereof, and upon the sale of the whole said property, to 1/800ths out of the net proceeds of said sale.”

Government's Exhibit 16, a group of checks from the witness, Ralph T. Montag, to the defendant, Phillip Suetter, on the following dates and in the following amounts:

March	7, 1934	\$ 500.00
March	13, 1934	\$ 50.00
March	27, 1934	\$ 450.00
May	23, 1934	\$ 500.00
May	29, 1934	\$1,000.00
June	14, 1934	\$ 350.00

(Testimony of Ralph T. Montag.)

June	20, 1934	\$ 50.00
July	31, 1934	\$1,250.00
Aug.	8, 1934	\$1,000.00
Aug.	22, 1934	\$1,000.00
Sept.	8, 1934	\$1,000.00
Sept.	17, 1934	\$1,000.00
Oct.	8, 1934	\$ 750.00
Oct.	20, 1934	\$1,000.00
Jan.	8, 1935	\$ 50.00
Jan.	14, 1935	\$ 750.00
Jan.	16, 1935	\$1,750.00
Feb.	7, 1935	\$ 100.00
Feb.	27, 1935	\$ 346.50
April	11, 1935	\$ 150.00
April	29, 1935	\$ 100.00
May	7, 1935	\$ 500.00
May	21, 1935	\$ 250.00
June	6, 1935	\$ 100.00
June	10, 1935	\$ 31.94
July	11, 1935	\$ 150.00
July	13, 1935	\$ 31.94
Aug.	14, 1935	\$ 150.00

[11]

Sept.	9, 1935	\$ 100.00
Sept.	25, 1935	\$ 400.00
Nov.	2, 1935	\$ 100.00
Nov.	16, 1935	\$ 50.00
Dec.	5, 1935	\$ 500.00
Jan.	13, 1936	\$ 31.94
Jan.	16, 1936	\$ 100.00
Jan.	23, 1936	\$ 258.00
March	17, 1936	\$ 25.00
April	1, 1936	\$ 250.00
April	7, 1936	\$ 200.00
April	13, 1936	\$ 225.00
May	28, 1936	\$ 50.00
June	8, 1936	\$ 100.00
Sept.	21, 1936	\$ 500.00
Sept.	28, 1936	\$ 250.00

(Testimony of Ralph T. Montag.)

Oct.	2, 1936	\$ 250.00
Oct.	9, 1936	\$ 500.00
Nov.	3, 1936	\$ 500.00
Oct.	22, 1936	\$ 150.00
March	20, 1941	\$ 100.00
Aug.	8, 1941	\$ 500.00
Aug.	22, 1941	\$1,500.00

In response to inquiry regarding Government's Exhibit 15, "Suetter Placer Mines Trust Agreement" the witness testified that he had not participated in the business arrangements in drawing up the deed of trust; that the mining claims embraced thereby were the same mining claims upon which he held a mortgage, that mining operations had commenced upon the property in 1934.

The United States thereupon offered Government's Exhibit 17, a letter dated March 30, 1935, from the defendant, Suetter, to the witness, Montag, the material portions of which are as follows:

"Dear Friend: Got your letter and checks but very sorry you take the attitude you take. Stop to think we got too much in this to take that slant. You sure must be informed by some undercurrent of some kind. It would be advisable for anyone to think little you haven't lost anything yet but got a lot to gain. Just the attitude you have taken on those two pay slips has convinced me that there is snake somewhere. In fact they are the only ones that work for the interest of the outfit in every respect. Waited for their money and would keep me informed on what was going on when out

(Testimony of Ralph T. Montag.)

for supplies. Blair Jacobs and those two that you refused to pay are the only four I have really had on job that I could put faith in so I am well convinced that something is rotten somewhere. Not having any clean up does not condemn the property or me either. I will be in about Tuesday."

To the admission of said exhibits 7 to 17, defendant, by his counsel, then and there objected, on the ground that the same was incompetent and on the [12] further grounds that the United States should be compelled to elect as to which count or counts in the indictment said evidence was directed.

The witness testified, referring to Government's Exhibit 9, that there had been no clean-up or any dividends from the operation in the 1934-35 season; that he had invested several thousand dollars as operating expense; that, according to a letter, Government's Exhibit 3, the mine was equipped and in operating condition on June 4, 1934, according to Montag's understanding with Suetter and that he could expect a clean-up; that there was never any clean-up on any of the mines as far as the witness Montag knew; and referring to Government's Exhibit 10, the witness testified that he had no understanding in regard to the phrase in the letter, "Please understand that the above agreements are in writing, duly signed and held by us, other than that contained in the letter Government's Exhibit 10; that he didn't know whom the agreements con-

(Testimony of Ralph T. Montag.)

cerned; that he assumed they were with the parties mentioned; that the witness had not any of the agreements; that the statements in said letter were statements of defendant Suetter as to what Montag's share would be.

Referring to Government's Exhibit 8, the witness testified that he presumed that the "E. H." referred to therein was a Mr. Ed Hogan, although he had never met the man.

Referring to Government's Exhibit 8, the witness testified that the checks were given to defendant Suetter in connection with the financing of the mining operations.

Referring to Government's Exhibit 18, the witness Montag testified that he had made no other deposits on Suetter's behalf, that he had paid out, on one or two occasions other money beside that represented by his checks and the mortgage given to the Grants Pass Bank for \$10,000; that those bills were for equipment paid for by Montag personally to the B. E. Davis Electric Company, and Steel Tank and Pipe Company.

To prove the amount so paid by the witness Montag, the United States offered Government's Exhibit 19, a group of correspondence and bills as follows:

Government's Exhibit 19, a group of miscellaneous bills [12] paid by the witness Montag to B. E. Davis Electric Company and other in the sum of \$5,798.92.

To the admission of said Exhibit 19, defendant,

(Testimony of Ralph T. Montag.)

through his counsel, then and there objected on the ground and for the reason that no foundation had been laid, that the evidence was not competent to prove the issues of the case at bar; that the evidence referred to a transaction prior to the crime charged in the indictment, which said objection was overruled and an exception allowed.

The witness further testified that he had never received any "Units" in the "Suetter Placer Mines."

On cross examination the witness testified that he was manager of the Montag Stove and Furnace Works; that he met the defendant Suetter when the latter was in the horse business in the Kenton district in Portland; that the witness Montag became interested with the defendant Suetter in mining properties in Mexico prior to the venture in the Josephine mines; that the defendant Suetter had communicated with the witness Montag constantly since 1933-34 up to the time of trial; that the dealings between the parties prior to the acquisition of the Josephine mines had not been objectionable to the witness Montag; that the defendant Suetter was not indebted to the witness Montag prior to the acquisition of the Josephine properties from any prior mining ventures; that he had made no personal investigation of the properties; that the witness Montag had advanced to the defendant Suetter \$5,000.00 to finance the properties based wholly on the information contained in letters sent by the defendant Suetter to the witness Montag; (Govern-

(Testimony of Ralph T. Montag.)

ment's Exhibits 1, 2) and his confidence in the defendant.

The witness Montag further testified that his understanding with the defendant Suetter was that Montag was to receive 50% of anything made off the properties; that he was not interested in selling the properties but was only interested in the operation of the mines; that he was never consulted about a sale of the properties.

In response to certain questions, the witness Montag testifies as follows:

Mr. Prendergast: Q. "Well, isn't it a fact, Mr. Montag, that prior to Phillip Suetter going East on this particular purpose [13] that you conferred with Robert Strong in regard to an option on these properties?"

A. "I did not, no."

Q. "You never did?"

A. "I met with Mr. Strong after he had made an investigation."

Q. "After Robert Strong and his associates had made an investigation of the properties you met with Mr. Strong; is that correct?"

A. "I think Mr. Suetter and I met with Mr. Strong."

Q. "Yes, and why did you meet with Mr. Strong?"

A. "Mr. Strong was interested in, had some clients or something in New York, as I understand it, who were interested in buying the property."

(Testimony of Ralph T. Montag.)

Q. "So you and Mr. Suetter went up and talked to him about buying the property?"

A. "No, I don't think I did."

Q. "What did you talk to him about?"

A. "I listened to his report."

Q. "And isn't it a fact at that time that the engineer reported that Phillip Suetter owned the property; that, however, he was associated with Mr. Ralph Montag, who had an interest in the property?"

A. "I guess. I don't remember all of the report, Mr. Prendergast."

Q. "You testified you were only interested in the operation of the properties, but your memory has served you better now and you have testified that you did go and see Robert Strong and associates in regard to the sale of the property?"

A. "Yes." [14]

Q. "And the report made by Robert Strong and associates engineers on this property on behalf of these clients was read to you at that time?"

A. "I think it was, yes."

Q. "And that was in regard to a sale of the property; that transaction with Robert Strong; isn't that correct? That is what you were up at Strong's office for?"

A. "Well, I don't know an actual sale was in progress."

(Testimony of Ralph T. Montag.)

Q. "Well, a contemplated sale?"

A. "Yes, perhaps a contemplated sale."

Q. "What was your understanding, if the property was sold, as to your participation?"

A. "Well, I don't know that there was any understanding. My feeling was——"

Q. "Well, what was your feeling then?"

A. "——that if the property was sold, and I consented and agreed to receiving half of the profits, or whatever they were——"

Q. "Half of whatever Suetter got for the sale of the property; is that correct?"

A. "Yes, I think so."

The witness Montag further testified that the properties were carried in the name of the defendant Suetter; that he did not consider himself a partner; that he was a "grubstaker"; that he paid the bills and advanced money in the operation of the mine; that he did not want the properties carried in his, Montag's name; and that he was to get half of what Suetter made from the properties.

The witness Montag also testified that the defendant Suetter informed him that he was going East to raise some money because Montag would not put up any more money; that the witness had advanced certain expense money to the defendant for the trip East; that the defendant Suetter informed the witness Montag that [15] he had interested some Catholic Clergyman in buying an interest in the property; that Montag did not object to such transaction.

(Testimony of Ralph T. Montag.)

In answer to certain questions propounded by the Court the witness testified as follows:

The Court: Q. "Now you knew he was negotiating with people to give them an interest in exchange for advancing finances which you did not care to advance any longer, or you were not in a position to?" A. "Yes."

The Court: "Is that correct?"

A. "Right."

The Court: "You knew that the money he was to secure from these people was to go into the further development of the mine and in acquisition of machinery, did you not?"

A. "I knew it from the letters, yes."

The Court: "You knew from the letters?"

A. "Yes."

The Court: "But when you say you didn't want anything to do with it you mean that you did not want to disclose your interest in the venture, you wanted him to do it in his own name so long as you were kept out of it; was that the idea?"

A. "No, it was more than that, your Honor."

The Court: "What was it?"

A. "The whole thing was I didn't want to be connected up with any deal that wasn't honorable and upright."

The Court: "You didn't know the details of the deal. All right. But leaving aside any

(Testimony of Ralph T. Montag.)

question of the honesty of the deal, you have made no objection to his negotiating with people in the East for the advance of money to operate the property, in which you claimed an interest; is that correct?"

A. "No, I think that is correct."

In continuing his testimony on cross-examination the witness Montag stated that he did not know who Ed Hogan was and upon reference by counsel for defendant to Government's Exhibit 12, Montag testified that the "B" referred to therein was the "Bishop"; that "E. H." referred to therein was Ed Hogan; and referring to Government's Exhibit 13, the witness Montag testified that he had sent the same to the defendant Suetter to the Stevens Hotel in Chicago; that the letter was [16] sent at or near the time that the defendant Suetter was to sell to the Bishop an interest in the property that the witness Montag claimed a one-half interest in; that the witness Montag knew of the negotiations being carried on by the defendant Suetter for the sale of interests in the mine and that he was at all times kept informed.

The witness identified Defendant's Exhibit 20 as a folio prepared by Robert Strong and associates relating to the properties embraced in the Josephine Mines upon which he held a mortgage; that he was the Mr. Ralph Montag referred to in said Exhibit 20.

Referring to Government's Exhibit 16, the witness Montag testified, on cross-examination, that

(Testimony of Ralph T. Montag.)

the checks therein contained had been advanced by him to the defendant Suetter for the Josephine properties but that certain of the checks; dated 1941, in the amount of \$2100.00, were for an altogether different mining venture at Fort Jones, California; that he was still associated with Suetter in mining ventures; that he had advanced money to the defendant Suetter in 1942; that the witness Montag was to received one-half of whatever was made on the properties.

The witness further testified that he had received no return from a "clean-up" from the Josephine Mines; that he did not know that some values had been recovered by the defendant Suetter that the money so obtained had been used to pay the men employed.

At the close of the examination the following questions were propounded by the Court:

The Court; "Mr. Montag, as I gather from your testimony, you at all times knew what was going on?"

A. "Yes—No, I won't say I knew all."

The Court: "I mean, you knew most——"

A. "Yes."

The Court: "of what was going on, and by your letters you showed—by the letters you received from Mr. Suetter and some of the replies—he was trying to account to you for the progress of the, I call it ex- [17] ploitation of the mine—the working of the mine?"

(Testimony of Ralph T. Montag.)

A. "Yes."

The Court: "And while you were furnishing the money he tried to give you an account every week or every so often, as to where the money went to; is that correct?"

A. "No, not quite that way—he would tell me at times."

The Court: "He would tell you at times?"

A. "Yes."

The Court: "Because you were always kicking that you didn't want to put in any more money; isn't that the idea?"

A. "Yes."

The Court: "Then after he went East you have already stated that you knew he went there to raise money?"

A. "Yes."

The Court: "In other words, you are not complaining of anything, that Mr. Suetter in any way misrepresented anything to you in order to get your money, are you?"

A. "No, I don't claim that."

The witness Ralph T. Montag was thereupon excused and the United States as its next witness called

MR. C. R. DEAN,

who testified on direct examination that he was in business with the Electric Steel Foundry in Portland, Oregon; That in 1938 he had sold to the defendant, Phillip Suetter, at the St. John Boscoe

(Testimony of C. R. Dean.)

Mine, a gold washing machine for \$34,366.50; that the machine was paid for in cash by checks on the Suetter Placer Mines during the course of construction; that the work was subcontracted by Electric Steel Foundry to A. Young & Sons Iron Works.

On cross-examination the witness Dean testified that the actual proposal was accepted on March 26, 1938; that the transaction for purchase of the machine was carried on with the defendant Suetter in Chicago, through A. W. Hopper, a representative of the Electric Steel Foundry; That the first proposal was made by letter dated March 24, 1938, and addressed to the Suetter Placer Mines, Chicago, Stevens Hotel; that said proposal letter was sent in line with negotiations theretofore carried on [18] by A. W. Hopper who had been sent to Chicago by the Electric Steel Foundry.

The witness Dean was thereupon excused and the United States then called as their next witness,

MR. WILLIAM J. YOUNG,

who testified, on direct examination, that he was a members of the A. Young & Sons Iron Works; that they had constructed a gold washing machine for the Electric Steel Foundry in 1938; that the defendant Suetter had picked up the equipment from the Young Company plant; that the A. Young & Sons Iron Works added equipment in the sum of \$5,750.00 above the original contract that said equip-

(Testimony of William J. Young.)

ment was paid for by checks for \$2,392.50 on the Suetter Placer Mines drawn on the St. John Boscoe Mine or by cash, both signed by Phillip Suetter; that three items of added equipment in the sums of \$198.00; \$270.38; and \$404.65 were paid for by checks from the Suetter Placer Mines; that the last two checks given in payment were personal checks of the defendant Suetter.

On cross-examination the witness, William J. Young, testified that he had knowledge that the equipment ordered was to go to the French Hill Mine in Del Norte County, California; that he was on the premises while the machine was being assembled.

The witness identified Defendant Exhibit 22, a photograph, as a picture of the equipment referred to; that as far as the witness knew the cost of the machine was \$39,750.00, but that some other equipment had been added; that this was the usual type of mining machinery used in the vicinity; that it was substantial equipment.

On redirect examination the witness, William J. Young, testified that there were no "jigs" or amalgamator on the machine at the time it was delivered; that the sum of \$12,000.00 was the reasonable price for such extra equipment; that the total price of the gold washer plus the jigs and the amalgamator would be \$51,750.00.

The United States thereupon produced

MR. EDWARD R. BACON

as a witness on behalf of the United States who testified that he was a dealer in construction and mining machinery; that he was located in San Francisco, California; that he purchased the "Gold Mining Machine" constructed by the Young Iron Works, from the defendant, Phillip Suetter, who represented himself as sole and exclusive owner and signed the Bill of Sale, on the Fourth day of April, 1939, for the sum of \$22,500.00. [19]

Upon the basis of testimony given by Mr. Edward R. Bacon as a witness on behalf of the United States, there was admitted in evidence Government's Exhibit #23, an affidavit executed by Phillip Suetter in connection with the sale of the gold-washing machine to Edward R. Bacon and Company, referred to on page 19 of the Bill of Exceptions. In this affidavit, which was sworn to and signed by Suetter, Suetter stated that he was the sole and exclusive owner of the washing plant. The witness Bacon testified that the purchase price of \$22,500 was paid to Phillip Suetter in the following manner: (1) Cashier's check for \$20,000, payable to the order of Phillip Suetter, was purchased by Edward R. Bacon and Company at the Bank of America in San Francisco and was forwarded to Suetter (Government Exhibit #25), (2) Check for \$2,500, drawn by Edward R. Bacon and Company, payable to the order of Phillip Suetter. The cashier's check, bearing the endorsement of Phillip Suetter, was later identified by Government witness Campbell, As-

(Testimony of Edward R. Bacon.)

sistant Cashier for the Bank of America, and was admitted in evidence as Exhibit #25. The bill of sale covering the gold-washing plant was identified by the witness Bacon and admitted in evidence as Exhibit #24.

The endorsement on Exhibit #25 shows that the cashier's check for \$20,000 was cashed by Suetter at the United States National Bank, Medford Branch. [19A]

The United States thereupon called

MR. NEIL R. ALLEN

as a witness on behalf of the United States who testified, on direct examination, that he met the defendant, Suetter, in 1934; that he was the attorney for the sellers in the purchase of the "George" mine; that the purchase price was \$8,000.00; that a discount of 20% had been allowed for cash making the actual purchase price \$5,400.00; that the transaction was completed on June 28, 1934.

The witness, Allen, further testified that he sold the "Baer Mine" to the defendant, Suetter, in 1938; that said mines were paid for by \$6,000.00 worth of "Diocesan" notes signed by Archbishop Francis J. Beckman; that the deeds to said property were drawn in blank at Suetter's request; that subsequently, at the request of attorney Roberts, attorney for Suetter, and attorney Reames, attorney for Archbishop Beckman, the name of Archbishop Beckman was inserted in the deeds.

WILLIAM E. PHILLIPS

was then called as a witness on behalf of the United States and he testified that he was the "Sales Engineer" for the "Link Belt Company", the world's largest manufacturer of mining equipment; that he was an engineer of 35 years experience in building and designing elevating and mining machinery; that he met the defendant, Suetter, in Chicago in the latter part of 1935 or the early part of 1936 and interested him in the purchase of mining machinery from the Link Belt Company; that Suetter explained to Phillips his plan of operation of the properties and gave Phillips detailed information regarding the property at Phillips request; that the information so furnished by Suetter was very satisfactory to Phillips.

Phillips testified that he advised Suetter that he, Suetter, needed a certain type of dredge to properly work the property; that the price of such a dredge was approximately \$250,000.00; that Suetter stated that he was properly financed. [20]

Phillips further testified that he assumed that the defendant Suetter was the owner of the properties; that they had discussed the types of machinery for the property; that he acted solely as salesman and not as engineer.

Upon identification by the witness, Phillips, the United States offered in evidence Government's Exhibit 36, the material portions of which are as follows:

(Testimony of William E. Phillips.)

ARTICLE OF AGREEMENT
for
PLACER MINING

"Article of Agreement made the 25th day of November A. D. 1936 between the Suetter Placer Mines of Josephine County, Oregon, and W. E. Phillips of Oak Park, Illinois, witnessed as follows: Unit No. 55

The Suetter Placer Mines of Josephine County, Oregon, owning 333 acres in Township 38A, range 9 W. M., Josephine County, Oregon, in accordance with a survey made showing 333 acres acres more or less have agreed to divide same into 800 units 350 to 375 to be sold at \$1,000.00 per unit for the purpose of purchasing the necessary equipment, such as Link-Belt gold reclaimer, to Link-Belt K-48 draglines, one Link-Belt K-48 Shovel, tractor and bulldozer, Keyston drill, cleanup equipment, electric lighting plant, as well as other necessary and essential equipment for the purpose of placer mining the above mentioned property.

The Suetter placer mines agree that before any profits are participated in by them, each purchaser of a unit is to be paid back in full his initial investment, together with 6 percent interest on the investment for the length of time necessary, before this money shall be paid back in full out of the earinings of the operation.

It is further agreed that should the Suetter

(Testimony of William E. Phillips.)

Placer Mines deem it advisable to permit part or parts of this property to be operated by others on a royalty basis that each unit owner shall participate in the profits proportionately to the number of units owned and that they in turn thru this medium of operation shall be paid back in full their initial investment plus 6 percent interest thereon before the Suetter Placer Mines participate in profits.

It is further agreed that after the initial investment plus interest has been paid back to the purchasers of the above mentioned 350 or 375 units sold to acquire money to purchase the necessary equipment for this operation, all unit holders shall share and share alike in the profits earned for the balance of the life of this property.

It is further agreed that a unit holder may transfer or sell his unit at anytime he should so desire.

All checks for units shall be made payable to Mr. Phillip Suetter in witness whereof, the parties hereto and hereunto, inter-changeably set their hands and seals, the day of the year first above written. In the presence of Suetter Placer Mines;

Per PHILLIP SUETTER

Rep R. E. GILMORE

This agreement to be subject to the approval and signature of Mr. Phillip Suetter. [21]

The United States also offered in evidence, after

(Testimony of William E. Phillips.)

identification by the witness Governments Exhibits 37, 38, and 39, identical with Government's Exhibit 36.

The United States further offered Government's Exhibit 40, a stock certificate as follows:

Suetter Placer Mines
Josephine County, Oregon
Picture of dredge

This certifies that William E. Philips is the beneficial owner of five (5) units of.....

Suetter Placer Mines
transferrable on the books and records of Suetter Placer Mines by the holder hereof in person or by duly authorized attorney upon surrender of this certificate properly endorsed. The transfer or assignment of this Certification is subject to the terms and conditions contained in a certain Declaration of Trust known as Suetter Placer Mines Trust Agreement dated January 2nd, 1937.

Dated January 2, 1937.

PHILLIP SUETTER
Trustee

Government's Exhibit 41, a copy of a 'Trust Agreement' identical with Government's Exhibit 15, and Government's Exhibit 42, identical with Exhibit 41.

To the admission of Government's Exhibits 36, 37, 38, 39, 40, and 42, the defendant, by his counsel, then and there objected, on the grounds and for the reason that the same were irrelevant, imma-

(Testimony of William E. Phillips.)

terial and incompetent and on the further grounds and for the further reason that the United States should be compelled to designate or elect as to which charge or charges in the indictment the said evidence was directed, whether to the counts charging violation on section 15, or section 18. The Court overruled said objection and allowed an exception.

Phillips testified that he had assays of the material from the property made to test the gold content; that he had an assay made without the defendant Suetter's knowledge (Defendant Exhibit 46); that he supplied the defendant with a photographic cut of a mining dredge, then in operation on another mine used by Suetter upon the heading of the trust "units;" that Suetter supplied a map with test holes [22] within two or three weeks after their first meeting and an analysis of the test holes; that Phillips advised Suetter as to the proper method of testing.

In regards to the photographic cut, Phillips testified as follows:

Q. Is that your practice in connection with your sales program, to furnish pictures of your machines? A. Yes, sir.

Q. For use on stock certificates?

A. Well, no sir, not on stock certificates.

Q. Was it put on this stock certificates with your permission? A. No, sir.

Q. Or your suggestion? A. No, sir.

On cross examination the witness, Phillips, qualified this testimony as follows:

(Testimony of William E. Phillips.)

Q. And I believe you testified that it was without your consent that he had this picture of the dredge put on this document?

A. It was not. I didn't say it was without my consent. I don't remember of him ever asking about that.

Q. But you were confronted with one on January 2, 1937, with a picture of a dredge on it?

A. That is right.

Q. And you made no protest at that time?

A. No, that is true.

Q. It was perfectly all right with you if he did that?

A. That is right.

Q. So that when you wrote to the Archbishop eleven days later you knew that Suetter had placed a picture of the contemplated dredge or a dredge of that type on these stock certificates?

A. That is true. That was fully understood—that he was to buy a dredge of that kind. [22-A]

Phillips testified that he became the owner of one "unit" in the "Suetter Placer Mines" on November 25, 1936; that the first agreement was in long-hand; that by January 2, 1937 the new agreements were ready and he received a certificate for 5 "Units"; that he gave a note for the first "Unit"; that said note was returned to him; that he had never parted with anything of value in exchange for any "Units" in the Suetter Placer Mines.

(Testimony of William E. Phillips.)

Phillips further testified that certain other employees of the Link-Belt Company had purchased "Units" in the Suetter Placer Mines; that upon their request all of the money so invested was returned to them by the defendant Suetter without question.

The witness Phillips also testified that he had not seen the property prior to January 2, 1937; that he had discussed the type of machinery with the defendant Suetter, and the cost thereof, necessary for the development of the property; that the material from the mine had been carefully analyzed under the direction of the witness; that assays had been made of the material under his direction; that tests had been made by the witness Phillips and the Link-Belt company to see *if* the material could be satisfactorily washed and processed.

Phillips testified further that he had been informed by the defendant that the property was being worked only in a small way; that there was some equipment on the property, a drag line, trommel screen, trucks and riffles, and separating machinery; that he, Phillips, visited the property in 1938, about August, and found there was plenty of water on the property; that the equipment was not in operation at that time except for the trucks and riffles; that he found no dragline or amalgamator; that the camp was good; that there were several trucks, a bulldozer and quite a few 6-inch pipes; that the equipment was substantially as out-

(Testimony of William E. Phillips.)

lined in the inventory the defendant, Suetter, had outlined to him. [23]

With reference to his visit to the Suetter Placer Mines, the witness, Phillips, testified as follows:

Q. Now did you ever see this Suetter placer mining property in Southern Oregon?

A. Yes, sir.

Q. About when did you see it?

A. Well, in '38.

Q. About what time of year?

A. In the summertime. I was out there about August, I think it was or September.

Q. Tell us about it.

A. Well, I went out to the property and Mr. Suetter wasn't there. There was a lady, two ladies, as a matter of fact, and seven or eight men were there, and I had lunch at the camp. It was a very nice camp. I found there was plenty of water but there was no equipment on the job. The trommel screen was—they had an old second hand machine or screen that was not fitted with any driving machinery and it couldn't revolve. There were several trucks, and a bulldozer, and quite a few pipe, quite a few feet of pipe, about 6-inch pipe.

Q. Was the machinery there in operation as described to you by Mr. Suetter?

A. No sir.

Q. When you procured this stock certificate?

A. Except that the riffles were there and

(Testimony of William E. Phillips.)

you could reclaim gold by shoveling the gravel into the riffles and letting it wash over. You wouldn't get satisfactory results.

Q. Nothing there except the riffles?

A. What is that?

Q. There was nothing there except the riffles in operation?

A. Well, of course the trucks were operating.

Q. The trucks?

A. Yes, sir, but you can't—

Q. But were there other machines there and not in operation? [23-A]

A. There was a screen there that was partially built. It was a second hand screen.

Q. Partially built?

A. (Witness nods his head.)

Q. A dragline?

A. No; I didn't see no dragline.

Q. Amalgamator?

A. No, sir, I didn't see no amalgamator.

Phillips further testified that nothing had been done to develop the property; that he had never received an accounting; that no proper testing had been done. He also testified that no one seemed to be in charge of the property when he was there.

The witness Phillips further testified as follows:

Mr. Dillard: Q. Did you attend any sales meetings and demonstrations conducted by Mr. Suetter? [23-B]

(Testimony of William E. Phillips.)

A. "I was asked to show a moving picture at the Stevens Hotel."

Q. "Did you do that?"

A. "Yes, sir."

Q. "Tell us about it, where you did it, when, and who was present."

A. "At the Stevens Hotel in Chicago. Father Beckman, and, Oh, I imagine there were eight or ten priests there, and I showed moving pictures and explained the operation of the machine."

Q. "What, if anything, was said there at this meeting by you? Did you make a talk or did you——"

A. "I explained the operation of the machine."

Q. "And was there anything said as to whether or not the machine was then in operation in Oregon?"

A. "No sir."

Q. "What was said about the machine? How did you explain your presence there? Why were you showing the moving pictures?"

A. "I was trying to—I was attempting to sell the machine."

The Court: "You designed it, didn't you?"

A. "Yes, sir. We were not discussing machinery that he had on hand on the property. We were promoting the sale of a new machine."

The Court: "You were not promoting the

(Testimony of William E. Phillips.)

sale of units; you were promoting the sale of your machine?" A. "That is right."

The further testimony of the witness, Phillips, was that he, at that time, informed those present that he property should be tested further to determine the exact type of machine necessary; that there were properties that his Company would refuse to build a machine for when the ground did not warrant it; That Archbishop Beckman was present at the meeting; that he, Phillips, took an order for a dragline from Suetter; that he had made no public recommendation of the property in order to assist in the sale of the "Units" in the Suetter Placer Mines. [24]

There was admitted into evidence, upon identification by the witness, William E. Phillips, Government's Exhibit 43, Letterhead Link-Belt Company, 300 West Pershing Road, Chicago, November 19, 1936, a letter which reads as follows:

"Mr. Phillip Suetter, Stevens Hotel, Chicago, Ill.

"Dear Mr. Suetter: In mining operations, as in other engineering fields, it occasionally happens that radical departures from standard practices to meet unusual conditions prove to be more effective than conventional methods.

"Our Company feels from experience that placer mining is probably one of the most legitimate types of business that anyone could enter or invest their money, provided a few com-

(Testimony of William E. Phillips.)

mon-sense essential rules are followed out. First, by purchasing a machine that is designed and built to suit conditions of the property on which the machine must operate. Second, knowing the gold values by proper testing. Third, installing equipment with capacity enough to show a profit based on the gold values and the nature of the material in the property. Fourth, determining definitely and positively the available supply of water to know whether it is adequate to operate on the scale continuously twelve months in the year that the property and machine be manned.

“There are only a few of the essential and important points, but provided they are known you have taken all of the speculation out of placer mining. Your tests will positively prove the values contained and a cross-section map can be made which will definitely give you exactly the amount of gold that can be reclaimed day in and day out. Tests are again important for the reason that it may be necessary to at times divert your operation as channels of creek and river beds are very irregular and they have changed in the course of time, necessitating your following the course of the channel of where the gold positively lies.

“Our Company is extremely anxious to furnish placer mining machinery, but we have refused on many occasions to do so after a careful study of the deposit we learned that there

(Testimony of William E. Phillips.)

are features there that will not permit a successful or profitable operation.

“We are proud to say that we have no placer mining machines that are not showing a very handsome profit to their owners. This we contribute entirely to the fact that we carefully take your test and make a thorough study and investigation before we are willing to serve you with a machine for this purpose. It has been the policy of our Company for many years past to never offer a machine for any service unless we are sure that it has good possibility of showing a profit when put into service.

“Getting back to your particular property, the Suetter Placer Mines, and taking the test that you have made showing the gold values contained therein, let us for arguments sake or an analysis of what can be done go into the figures of the possibilities. [25]

“The machine has a capacity of from 6 to 10 thousand yards per 20 hour day which is naturally dependent upon the depth and nature of the digging, but let us assume a capacity of 5 thousand cubic yards a day at values of \$1.30. \$1.30 multiplied by 5 thousand cubic yards would give you \$6,500.00 per day recovery, multiplied by 26 operating days per month, or \$196,000.00 per month, multiplied by 12 months per year or \$2,028,000.00 gold recovery per year.

(Testimony of William E. Phillips.)

“Based on 5 thousand yards per day multiplied by 26 operating days per month equals 150,000 cubic yards per month at an approximate operating expense of 12c per cubic yard, which would be very conservative, give you an operating expense of \$18,000.00 per month multiplied by 12 months equals \$216,000.00 per year or a net profit of \$1,812.00 per year.

“In order to be conservative, which is always a good policy when talking to a prospective customer or investor, let us base these figures on 65c per cubic yard, which is half of what your test proves you have, which gives you \$1,014.00 gold recoverable per year. Deduct from this your operating expenses of \$216,000.00, giving you a net profit of \$798,000.00 per year, or in other words, you will be able to pay back the unit holders their initial investment plus interest and have \$300,000.00 to be divided among your 800 unit holders.

“There is so much that could be said and can be said regarding this type of an installation and I assure you that have you any friends who would like to have me go into detail more with them or you regarding this unit, it would indeed be a pleasure to do so.

“I am personally very enthusiastic about your property and really believe it is one of the outstanding placer properties in the United States today. It is not my intention to paint this picture for you but I indeed am anxious to

(Testimony of William E. Phillips.)

be conservative and give you the facts as they actually exist.

“With kindest personal regards, I am,

“Yours very truly,

“LINK-BELT CO.,

W. E. PHILLIPS,

Engineer.”

The witness Phillips testified in regards Government's Exhibit 43, that he wrote the same in his capacity as sales engineer; that it was based upon information supplied by the defendant, Suetter; that Suetter did not profess to be an engineer but that others had made the tests.

On cross examination, the witness, William E. Phillips, testified that he had been employed by the Link-Belt Company 20 years as sales manager; that he had a wide experience in the design and manufacture of mining equipment; that [26] he was familiar with mines and mining generally; that he had designed gold mining equipment prior to meeting the defendant, that he met the defendant; at the Link-Belt plant in Chicago in 1935 or 1936; that Suetter informed him that he wanted to purchase machinery and supplied Phillips with certain information about the properties; that the type of machine needed was discussed and concluded that a dredge, or gold washing machine, costing \$250,000.00 was needed; that Phillips contracted to sell Suetter a dragline costing \$27,000.00 to be used while the large dredge was being constructed.

(Testimony of William E. Phillips.)

The witness further testified on cross-examination as follows:

Mr. Prendergast:

Q. "What is the practice of the Link-Belt Company, through yourself as sales engineer, when a man comes in and orders a \$27,000.00 machine? Do you make an investigation of the property?" A. "Of the property?"

Q. "Yes, that he proposes to put it on?"

A. "We get information as to what the machine is to be used for."

Q. "Yes."

A. "The information is on the property. We don't propose to test the property but we are always assured that the property has been properly tested."

Q. "How are you assured; merely by the statement of the person interested in purchasing?" A. "By authentic tests?"

Q. "Authentic tests?" A. "Yes, sir."

Q. "In this particular case did you have any authentic tests made?"

A. "No, sir." [27]

Q. Why did you deviate from your normal practice in this case? A. We did not.

Q. You said—maybe I misunderstood you—you said you have authentic tests made?

A. Yes, sir.

Q. Is that correct?

(Testimony of William E. Phillips.)

A. I say authentic tests must be made. I didn't say we would have them made.

Q. Well, how did you determine whether they were authentic or not?

A. By the reputable engineers or exploration crews.

Q. You don't take the word of the man who proposes to buy the machinery?

A. Not entirely.

Q. All right. Now let's talk about Suetter. When Suetter came to you did he say he had \$27,000.00 cash to buy the dragline?

A. Mr. Suetter said he had the money, and gave us a cash deposit of \$5,000.00.

Phillips further testified that his equipment was not delivered to the defendant; that the Link Belt Company cancelled their contract with Suetter for the sale of the equipment; that no authentic tests were made of the property before the contract of sale was entered into; that layouts of the proposed gold dredge had been made; that Suetter had had sent to the Link Belt Company from the Suetter Placer Mines one-half ton of gravel for the purpose of testing to see if gold could be recovered therefrom; that the witness tested the gravel and had the Robert W. Hunt Company, mining engineers, also test the samples; that the tests in both instances were very, very satisfactory; that Phillips had never had an assay report from the Hunt Laboratories nor requested one.

(Testimony of William E. Phillips.)

In reference to the cancellation by the Link Belt Company of it's contract with Suetter, Phillips testified as follows:

Q. You state that he represented to you that he had the cash to pay for it?

A. Yes; we wanted to get the machine out, which would take six or seven [28] weeks or about two months and he would pay \$5,000.00 deposit, and upon shipment of the machine he would pay cash for the balance.

Q. Was that if the company said that he could purchase this dragline on terms to be agreed upon; that meant the terms that you have just spoken of. That is correct?

A. Or satisfactory other arrangements. We sell draglines on a deferred payment plan.

Q. Now, did you make any investigation as to his ability to pay off this cash—this \$27,000.00?

A. Yes, sir.

Q. What did you find from your financial investigation?

A. That they asked not to accept the order.

Q. They asked not to accept the order. Who is they?

A. Our credit department.

Phillips testified that Suetter had described the property very satisfactorily at their first meeting; that Suetter did not have nor represent the gold content of the properties; that he did have a map of some test holes, made by some engineer, of the

(Testimony of William E. Phillips.)

property; that the tests made of the gravel showed a recovery of \$1.65 per cubic yard; that based on the figures contained on the test-hole map of \$1.30 per cubic yard he had written Government's exhibit 43, heretofore quoted.

The witness further testified that he had contemplated the purchase of units [28-A] in the Suetter Place Mines because he believed it a good investment from the information he had; that he first knew of the existence of the units in the latter part of 1936; that he had this information and referred to the units in his letter of November 19, 1936 (Exhibit 43); that he had made public statements about the value of the units; that he always was enthusiastic about the property; that he, Phillips, had made statements to Archbishop Beckman in regards the value of the mines.

There was also introduced into evidence Defendant's Exhibit 46, identified by the witness, which reads as follows:

“Link Belt Co., Chicago Plant, 300 W. Pershing Road, Chicago, January 14, 1937

“Archbishop Francis J. Beckman, Locust and Eleventh St., Dubuque, Iowa.

“My dear Archbishop: After having talked with Mr. Suetter this morning who told me that he had a telephone message from you within the last day or so, advising that you would undoubtedly be able to see him shortly, I thought possibly you might be interested in knowing

(Testimony of William E. Phillips.)

what progress is being made with reference to the equipment for his placer mining operation.

“Since talking with you in the Stephens Hotel several weeks ago, and I believe while there, I requested that Mr. Suetter have some of the material from his property sent us, to verify and confirm exactly what type of equipment would be necessary to extract the gold. The writer decided that while Mr. Suetter had no idea, I was going to do this to make a positive extraction of the gold to see how much values were contained therein per cubic yard and it gives me great pleasure to inform you that we were able to reclaim values amounting to \$68.00 per ton. To make another check of what we had done, we sent part of this material to the Robert W. Hunt laboratories and they also verified, and as a matter of fact were able to reclaim a little more values than we were. This however may be due to the fact that the material we sent them possibly could have been from the bottom of the sacks or boxes and as we all know, gold being heavier in weight than sand or gravel, the gold would settle to the bottom, but from all the tests in the entire quantity, taking an average, the values run in the neighborhood of \$68.00 per cubic yard.

“This however is really amazing and I do not want to mislead you in anyway. I do not think however that the values will run that

(Testimony of William E. Phillips.)

high throughout the entire property but it bears out what Mr. Suetter had told us right along. He has not tried to exaggerate in any way, shape or form, but has been very conservative in all of [29] his estimates as to the values contained in this property.

“With this information as well as much other Mr. Suetter has given us, it was decided that prior to the building and furnishing of the large machine that (a) dragline could be sent out in advance to operate in connection with some trommel screening equipment he has already and by high grading, as well as prepare the side for the acceptance of the larger unit, it would work out to the advantage of all and consequently he has placed with us an order for the dragline wherein we expect to ship on about January 20th.

“In view of the facts that these tests we made proved to contain the values they did, many of the boys in our plant have become interested and have purchased from Mr. Suetter quite a few units and many more are contemplating doing so in the very near future. While we come in contact with placer properties very often, I do not hesitate to say that this particular piece in my opinion is as good if not better than anything I know at the present time, and believe that you will also find it the same, should you be further in-

(Testimony of William E. Phillips.)

terested in going along with them in this contemplated project.

“I am merely writing this letter to advise you of the progress we have made, what is actually being done and should you want any further information of facts we are able to obtain, or have received in connection with the Suetter Placer Mines, it would be a pleasure to forward to you immediately, any such information we may have, upon request.

“With kindest personal regards, we are

“Yours very truly, Link Belt Company,

W. E. PHILLIPS,

Engineer.”

In explanation of this letter the witness testified that Suetter knew about the tests; that he did not know for what purpose the gravel had been sent from his property; that Suetter had not tried to exaggerate, in any way, the property; that the dragline was to be used preliminary to the \$250,000.00 gold dredge; that the reason the Link Belt employees were interested in purchasing units were because of the tests made by Link Belt Company and the witness, Phillips, not by Suetter; that there was no agreement between Suetter and Phillips that Phillips should receive any commission for interesting the employees of Link Belt Company in the purchase of units; that Phillips knew that the units were being offered, but not the identity of the particular persons to whom they were be-

(Testimony of William E. Phillips.)

ing offered; that the cut of the picture of a Link-Belt dredge featured on the unit certificates was furnished by Phillips to the [30] defendant, Suetter, on the occasion of their first meeting for that purpose; that prior to that time Suetter had no units or stocks certificates and had offered none to Phillips; that Phillips knew that the trust unit certificates were printed in Chicago in January, 1937; that he had never protested the use of their dredge photograph on the trust unit certificates although he saw the same on January 2, 1937.

Counsel for the defendant, referring to Government's Exhibit 36, read same as follows:

“Articles of Agreement for Placer Mining”

“Articles of agreement made the 25th day of November, A. D., 1936, between the Suetter Placer Mines of Josephine County, Oregon and W. E. Phillips of Oak Park, Illinois.

“Witnessed as follows: Unit No. 52.

“The Suetter Placer Mines of Josephine County, Oregon, owning 333 acres in township 38S; Range 9 W. M. Josephine County, Oregon in accordance with a survey made showing 333 acres more or less, have agreed to divide some into 800 units, 350 to 375 to be sold at \$1,000.00 per unit for the purpose of purchasing the necessary equipment, such as a Link Belt gold reclaimer, two Link Belt K-48 draglines, one Link Belt K-48 shovel, tractor and bulldozer, Keystone drill, cleanup equipment, electric lighting plant, as well as

(Testimony of William E. Phillips.)

other necessary and essential equipment for the purpose of placer mining the above mentioned property."

And in answer to questions propounded the witness testified that the first agreement delivered to the witness contemplated the purchase of machinery "such as" Link Belt equipment; that Suetter had already purchased a dragline from the witness; that when the units were drawn up Phillips was contemplating the sale of over \$280,000.00 worth of equipment to Suetter; that he did not check Suetter's financial condition; that he had written to Archbishop Beckman that a considerable part of the financing would be obtained from Link-Belt employees; that the witness, Phillips, was satisfied the mines were a good proposition; that even after being informed by the credit manager of the Link Belt Company of the cancellation of Suetter's contract the employees and Phillips were still interested in the property as investors.

Phillips further testified on cross-examination that he visited the property [31] in 1938; that he was satisfied with what he saw of the property; that his opinion in *regard their* high value had not changed.

The witness further testified as follows:

Mr. Prendergast,

Q. You testified Suetter said he would like you to have four more units because they were a good investment?

(Testimony of William E. Phillips.)

A. That is right.

Q. As a matter of fact, you told Suetter they were a good investment, didn't you?

A. I believed that.

The further testimony of Phillips on cross examination was that Suetter had informed him of the equipment on the property; that upon his visit the only equipment *the* could be used were the riffles; that there was plenty of water; that what was needed was proper machinery; that Phillips was enthusiastic about the property and that he was presently and is presently of the same mind regarding the value of the property; that he went to Suetter in 1938 in Chicago and asked that the money invested by the Link Belt employees be returned because the property had not been developed; that he had "interests" in the property in spite of the fact that he had never paid anything for the five units that he had received; that he, Phillips, had refused to return the Units to Suetter's attorney in spite of demand made; that Suetter had never deceived nor misrepresented anything to the witness.

On re-direct examination Phillips again testified that there was no machinery on the property with which gold could be mined; that after he returned from his trip to Oregon he met Suetter at the Stevens Hotel and requested the return of the money invested by the Link Belt employees as well as the note he had personally given to Suetter. Regarding this, Phillips testified as follows:

(Testimony of William E. Phillips.)

Q. How did it happen you regained possession of your promissory note to Suetter?

A. I met Mr. Suetter in the Stevens Hotel and told him that he hadn't started work up there, no machinery was on the job, and that I wanted him to return the money to the boys who had invested.

Q. Did he return it at that time? [32]

A. Yes, sir, without any argument.

Q. Was that before or after you had come out here to Oregon and had been down to the mine?

A. That was before.

Q. You got your money before you went down to the mine?

A. No, no; that was after I came to Oregon you mean?

Q. Yes.

A. Yes; that was after I came.

The witness Phillips further testified that after the Stevens Hotel meeting, Suetter told Phillips that the latter should not have brought up the question of testing the property; that he had already had the property tested; that Phillips replied that the testing was not satisfactory.

The United States thereupon called

MARJORIE J. MONEY

who testified, on direct examination, that she was a Notary Public for Oregon; that she was a quali-

(Testimony of Marjorie J. Money.)

fied legal stenographer; that she had taken the deposition of the defendant, Phillip Suetter, on January 3, 1941, in Portland, Oregon, in connection with the case of Rhode v. Suetter, a civil case in the United States District Court for the District of Oregon.

After identification by the witness, the United States offered Government's Exhibit 48, a transcript of the deposition of Phillip Suetter, the material [32A] portions of which are as follows:

Mr. Hickson, Q. "What I am trying to get at, Mr. Suetter, is who made the tests that were made?"

A. "Well, I hired people there to put down holes. I had Bob Strong come down. He put down eight holes; he seemed satisfied but we couldn't make a deal."

Q. "When you say 'put down holes' what kind of test holes were these?"

A. They were 4½ by 6."

Q. "Then you just dug holes down to bed-rock?"

A. "Yes."

* * * * *

Q. "How many of these test pits were put down by you and these parties you mention?"

A. "There was probably fourteen or fifteen."

Q. "And were those spotted about on the 320 acres?"

A. "Well, yes, they were all on this property."

(Testimony of Marjorie J. Money.)

Q. "Was that all the testing that was done?"

A. "Well, we worked there and took out some gold, and the solution——"

Q. "What was the average per yard recovery from the tests?"

A. "Well, on the tests they run up as high as \$1.50 and one down as low as five cents. You can go over it anywhere and you won't get a blank on the place, hardly."

Q. "What I asked you was, what is the average?"

A. "I don't know."

Q. "After you made these tests and sunk the pits, did you prepare a log?"

A. "No."

Q. "You just kept the record in your head?"

A. "No, I kept it in my head, and I knew the gold was there, [33] that was all."

Q. "Were those tests made before you purchased the property from Judge Norton?"

A. "No."

Q. "They were made afterwards?"

A. "Afterwards."

* * * * *

Q. "Up until the time of the execution of the Trust Agreement, did you ever have an engineer examine the property and report on it for you?"

A. "Well, I have had several engineers, plain practical engineers. I got one who made

(Testimony of Marjorie J. Money.)

a report on it, and I have had others. I had George Norton, and I know it was the truth, there have been spots in there that have taken out lots of money."

Q. "Now, what mining engineers ever tested the property and made a report for you concerning the values?"

A. "Well, a man by the name of Stewart claimed he was an engineer. I don't know where he came from but he had a test of the property. And there was a man by the name of Hamilton. There were some California engineers up there to take the property, but I already had it—lived up there and put up some camp."

Q. "Have you employed these men as engineers?"

A. "No, I didn't employ them at all; they came up to get the property, wasn't under my employ at all."

Q. "As I understand then, you never did employ engineers to sample and test the property?"

A. "No."

Q. "What was your purpose, Mr. Suetter, in the execution of [34] of the Suetter Placer Mines Trust Agreement?"

A. "Well, to get money to build roads. I had to build roads all the way from the highway to the mine. To build roads and buildings, and I wanted to get equipment."

(Testimony of Marjorie J. Money.)

Q. "You wanted to get equipment and money with which to finance the operation; is that correct?" A. "Yes."

On cross-examination the witness, Marjorie J. Money, testified that she was employed, at the time of the taking of the above deposition, by Mr. John Hickson, attorney for the plaintiff, P. P. Rhode; that she had no personal knowledge as to what property was referred to; that the case of Rhode V. Suetter was settled.

The United States then called

FATHER STEPHEN A. BUBACZ

who testified that he was a Catholic Priest; that he resided in Chicago, Illinois; that he had advanced certain money to one Ed Hogan who had represented himself as owner of the Josephine Mines; that Father Bubacz had met the defendant, Suetter, some months after he had parted with funds to Hogan; that Suetter informed him that Hogan was not the owner of the properties; that the "Units" were given to Bubacz by Suetter for the money advanced to Hogan.

The testimony of the witness, Father Bubacz, was that the defendant, Suetter, had given the witness seven "Unit Certificates" in the Suetter Placer Mines; that Father Bubacz had never parted with anything of value to the defendant, Suetter, in exchange for the "Unit Certificates"; that the

(Testimony of Father Stephen A. Bubacz.)

defendant, Suetter, had never made any representations of any kind regarding the property, its value or potential value, to the witness in any attempt to sell any "units" to the witness, Father Bubacz.

The United States offered in evidence, upon identification by the witness, Government's Exhibits 49, 50 and 51, all being "Units" in the Suetter Placer Mines held by the witness, Father Bubacz, and Government's Exhibit 52, a copy of the Trust Agreement, the latter being identical with Government's Exhibit 15, heretofore quoted.

[35]

The witness, Father Bubacz, further testified that he had arranged a meeting with Bishop Paul P. Rhode for the defendant, Suetter; that Archbishop Beckman and the defendant had met in Chicago at Father Bubacz's home.

The witness also identified Government's Exhibit 53, a telegram dated September 29, 1940, being the same as contained in Count 5 of the indictment and testified concerning the same that after settlement of the lawsuit as between Archbishop Beckman and the defendant, Suetter, Beckman had placed the affair in the hands of a committee and he, Bubacz, was part of said committee and that said telegram referred to the terms of settlement as between Archbishop Beckman and the defendant, Suetter, and not to any transaction in regards the Suetter Placer Mines.

(Testimony of Father Stephen A. Bubacz.)

The witness also testified that he had discussed the properties with William Phillips of the Link-Belt Company, that he knew of the results of the tests made by Phillips and the Link-Belt Company, that Father Bubacz had discussed the properties and their values with Archbishop Beckman; that he had called Archbishop Beckman to arrange a meeting with Suetter; that Suetter met the Archbishop Beckman in Bubacz's residence in Chicago; that in the discussion of the mine values the representations of Phillips, after he had inspected the property, were discussed.

BISHOP PAUL P. RHODE

was thereupon called by the United States and he testified that he met the defendant, Suetter, at the Bishop's residence in Green Bay, Wisconsin, about the middle of March, 1937; that he had previously met Ed Hogan; that the defendant, Suetter, at that time, presented to the Bishop his desires for development of the mines; that on the occasion of the first meeting with the defendant, Suetter, Bishop Rhode purchased "units" in the venture.

In the course of the direct examination the United States offered in evidence, after identification by the witness, Bishop Rhode, Government's Exhibit 57, a letter dated December 11, 1937, ad-

(Testimony of Bishop Paul P. Rhode.)

dressed to the witness and signed by the defendant, Suetter, as follows:

“The Stevens, Chicago”

December 11, 1937 [36]

“Most Rev. Paul P. Rhode

Green Bay, Wisconsin

Dear Bishop:—Your letter received. I note all and don't let anything worry about check. I will not put check through only satisfactory to your excellency and will keep you informed. Dropping of stock market has delayed me some also. Where people could not meet their obligations they would have liked but those things happen.

“We can't govern them but everything is going fine at the property. Had little delay about getting in fuel oil but that is all overcome now so I expect they will be in operation by the time I get home or before move. I see the condition of employment and business in general more anxious. I am getting to get started on No. 2 outfit is on account one outfit makes money two will make more.

“I will close.

Sincerely yours,

PHILLIP SUETTER,

Kerby, Oregon”

The defendant, by his counsel, objected to the receiving of said letter into evidence unless the United States elected as to what count or charge the evidence was directed. Counsel for the United

(Testimony of Bishop Paul P. Rhode.)

States stated that the letter was offered in proof of a "general scheme." The Court overruled the objection, to which ruling counsel for the defendant then and there excepted.

The United States also offered, after identification by the witness, Bishop Rhode, Government's Exhibits 58, 59, 60, 61, and 62, the same being identical in form to Government's Exhibit 40, heretofore quoted, and being "Units" in the Suetter Placer Mines running in favor of Bishop Paul P. Rhode.

There was also offered and received in evidence, after identification by the witness, Government's Exhibit 63, papers with envelope attached, of which the witness testified that he had received the same through the mail from the defendant, Suetter, on or about November 4, 1939, and that said envelope contained Units Numbers 27 and 28.

The witness also identified Government's Exhibit 64, a group of cancelled checks, from the witness, Bishop Rhode, to the defendant, Phillip Suetter, as [37] follows:

May	3, 1937.....	\$2,500.00
March	16, 1937.....	\$5,000.00
April	21, 1937.....	\$2,500.00
June	1, 1937.....	\$2,500.00
June	15, 1937.....	\$2,500.00
Nov.	30, 1937.....	\$5,000.00
Jan.	3, 1938.....	\$5,000.00
May	8, 1939.....	\$1,000.00
July	27, 1939.....	\$2,000.00

(Testimony of Bishop Paul P. Rhode.)

The United States also offered in evidence, after identification by the witness, Government's Exhibits 65 and 66, the same being copies of the Trust Agreement of the Suetter Placer Mines, signed by the defendant, Phillip Suetter, and being identical with Government's Exhibit 15, heretofore quoted.

Exhibit 67, a letter dated July 12, 1937, Phillip Suetter to Bishop Paul P. Rhode, which reads as follows:

"Dubuque, Iowa
July 12, 1937

"Bishop Paul P. Rhode,
Green Bay, Wisconsin.

Dear Bishop:

"Wish to inform you nothing to worry about. Roy Gilmore tried to pull a dishonest stunt. I checked him out and he got nasty. After investigation he pulled for himself six months to a year in prison. The dragline is on the grounds, truck and drill will be started this week.

"This man has cost me a delay of four months, they wanted me to prosecute him, I refused as I told them I'd rather say a prayer for him that God may guide him and his companions.

Yours very truly,
PHILLIP SUETTER"

(Testimony of Bishop Paul P. Rhode.)

was offered in evidence by the United States. The defendant, by his counsel, objected to the receiving of said letter in evidence unless there was an election by the United States as to which counts, or charges, in the indictment said letter was directed. Counsel for the United States stated that it was offered as proof of a "general scheme." The Court overruled the objection, to which ruling counsel for the defendant then and there excepted.

Bishop Rhode testified, on direct examination, that he had invested [38] \$30,000.00 for 30 units in the mines, that he had relied upon the following statements of the defendant as to their value and the ownership:

"Q. Now will you tell me, Bishop, will you remember as much as you can of the conversation between yourself and Mr. Suetter when you first made a purchase of one of those certificates.

A. Mr. Suetter, on taking a seat in the room, as well as Mr. Roy Gilmore, opened up the conversation by telling me that they had a specially fine, a specially fine project of placer mining in the County of Josephine, I believe, in Oregon, and that they had come to interest me in the matter and to find out whether I would not become a purchaser of shares or units in the same, and as the basis of this they represented to me an agreement of trust as between Mr. Suetter, the owner, and the pros-

(Testimony of Bishop Paul P. Rhode.)

pective purchasers. I had some knowledge of this agreement of trust, for I found a copy of that on an occasion of a visit at the home of the Reverend Stephen Bubacz. Nevertheless, I read this agreement over once more, article for article, and gave it some thought, and came to the conclusion that it was a document in all respects covering the situation and satisfactory. This led to a conversation as regards the merits of the property itself, and on that visit, and on subsequent visits, I was told of the merits of this territory or land that was covered by the Agreement of Trust; that the gold values there in the sand and gravel were such that for years past it repaid the individuals who did some gold panning there but that nothing more was done excepting to skim the surface, and that with capital and a purchase of machinery, and with work at a depth, considerable recovery could be had. Also it was said that in the past there was a lack of water to operate any placer mining proposition but that Mr. Suetter had acquired water rights amply sufficient to carry on operations and that it was only a question of the purchase of machinery to make this a paying proposition. More than that, he stated that miners and experts in mining had been consulted and that they agreed that there were value there that had not as yet been touched. I also was told that twenty holes were sunk

(Testimony of Bishop Paul P. Rhode.)

or drilled in various parts of the property and that the showing confirmed the findings or the [38-A] opinion of the engineers or the experts in mining, and other remarks and statements of the same kind had been made—were made.

To begin with, I asked Mr. Suetter as to whether he had a clear and legal title to the property, to which he replied that he had. And as to the value, why he said that there was no doubt at all that on the basis of the findings in those holes the recovery would go into millions; I think he mentioned *wither* twenty or fifty million, something like that, although I wouldn't be sure.

Q. I didn't quite understand that last, Bishop Rhode. He mentioned what?

A. He mentioned that from twenty to fifty million could be recovered in time, if I am not in error, and similar remarks of that kind, proving that he knew what he was doing and that what he was proposing and offering was a property and an opportunity that was rare, because placer mining, after all, is the cheapest form, the most economic form of operating. That, in short, was more or less what was stated to me during the first and subsequent visits that I received from Mr. Suetter.

Q. Did you have *any* information from Mr. Suetter regarding the existence of a one-half interest in the profits of these mining opera-

(Testimony of Bishop Paul P. Rhode.)

tions in favor of Ralph Montag of Portland, Oregon?

A. I never heard the name of Montag until the other day here in court.

Q. Did you have any information regarding the existence of a mortgage for the full value of the purchase price of the properties?

A. I did not.

Q. In favor of Ralph Montag?

A. I did not. On the contrary, the remarks that Mr. Suetter made led me to believe that he, in his own *mane*, was the owner of the property.

Q. Now as I understand it, your purchase of these several units you have told us about took place over a period of time beginning probably early in 1937? A. Yes.

Q. And ending in 1939; is that correct, Bishop?

A. If I am not mistaken, that is correct."

[38-B]

He further testified that he had commenced a civil action against the defendant and that said civil action had been withdrawn by the plaintiff, Rhode, and the defendant, Suetter, had been released from all claims to Rhode.

There was admitted into evidence, after identification by the witness, Bishop Rhode, and without objection by the defendant, Government's Exhibit 68, an indictment letter contained in Count 6 of said

(Testimony of Bishop Paul P. Rhode.)

indictment; Government's Exhibit 69, an indictment letter contained in Count 7 of said indictment; Government's Exhibit 70, an indictment letter contained in Count 1 of said indictment; Government's Exhibit 71, an indictment letter contained in Count 2 of said indictment.

Bishop Rhode testified that he had received Exhibits 69, 70, and 71 from the defendant, Phillip Suetter, in the ordinary course of mail at or about the time indicated by the letters and that he had transmitted Exhibit 68 to the defendant, Phillip Suetter, through the ordinary mail at or about the time indicated by said letter.

On cross-examination, the witness, Rhode, testified as follows:

Q. "Bishop Rhode, after that time, and before you met Phillip Suetter did you further discuss these properties with Father Bubacz?"

A. "On one occasion when paying him a visit, he showed me a copy of the agreement of trust and told me—asked me what I thought of it. I picked it up and read it and said 'It looks like a pretty fair document.'"

Q. "Am I correct, now, that was before you met Suetter."

A. "That was before I met Suetter, yes."

Q. "Bishop Rhode, may I refer you to—Mr. Bailiff, will you *had* the witness Government's Exhibit 66. Bishop Rhode, will you take in your hands and tell us whether or not this trust agreement displayed to you by Father

(Testimony of Bishop Paul P. Rhode.)

Bubacz [39] upon the occasion of your visit to Father Bubacz was the same in form as the document you now hold in your hand."

A. "It was all in the same form."

Q. "It was in the same form?"

A. "Yes."

Q. "And that was before you ever met Phillip Suetter?"

A. "Indeed."

Q. "Now, Bishop Rhode, at that time did Father Bubacz display to you the certificates which you eventually received, some of which were eventually received, such as Government's Exhibit 59, with a picture of a dredge on it?"

A. "I have no recollection of that. It seems not."

Q. "You are aware that in a form of a trust agreement, which you now hold in your hand——"

A. "Yes."

Q. "——that the paragraph that appears as the third paragraph under the description of the property, in other words, the first paragraph under the fold with the paper folded in half, in order to point out to you—Mr. Bailiff, will you assist Bishop Rhode in finding the paragraph."

The Witness: What words begin the paragraph?

Mr. Prendergast: "It is understood that for each one thousand dollars paid to the trustee,

(Testimony of Bishop Paul P. Rhode.)

by any person, firm or corporation, under the terms and conditions of the trust, the trustee will issue to said person, firm or corporation making said payment, a certificate of ownership for one individual unit in said trust, which certificate is to be signed by the trustee hereunder, and he [40] subject to the terms and conditions herein contained."

The witness: "What do you ask me in relation to this?"

Q. "I ask you to refer to that now."

A. "Yes."

Q. "And I ask you now if you recollect that in the trust agreement form as displayed to you by Father Bubacz before you ever met Phillip Suetter, if the same provision was contained in that agreement?"

A. "I have no reason to disbelieve that this article was in that copy which was submitted to me. I believe it was."

* * * * *

Q. "Yes. Did you understand, Bishop Rhode, that anyone contracting upon that trust agreement, anyone joining in that trust agreement and paying money, would be issued certificates of ownership?"

A. "I understand the matter in this way: That under a trust agreement there is a trustee and there are beneficiaries. The trustee may be the owner or he may perhaps merely have control to some extent of the property in question."

(Testimony of Bishop Paul P. Rhode.)

Q. "Yes. Now then, recollecting the same period of time before you met Suetter and after you met Hogan, in any of the discussions with Father Bubacz did Father Bubacz at any time tell you, or inform you, that Archbishop Beckman might be or was interested in investing in this property?"

A. "He made mention of the fact that Archbishop Beckman may be interested in this undertaking."

Q. "And what did he say in that connection?"

A. "Well, it is difficult for me to try to recall his statements on that occasion. It was no formal review of [41] this document, nor a real discussion of the property involved. It was a casual conversation on the matter; that was all."

Q. "Well, was it your understanding that Archbishop Beckman contemplated making investments in this property?"

A. "Insofar as his name was mentioned in connection with it; that was all."

Q. "Yes. Now, did Father Bubacz discuss with you, prior to your meeting with Phillip Suetter, the possible machinery required to operate such a mine and the possible places where this machinery might be purchased?"

A. "No."

Q. "Did he say anything to you about the Link Belt Company of Chicago?"

(Testimony of Bishop Paul P. Rhode.)

A. "No, later on, some time after this was under way, he mentioned the fact that a certain Mr. Phillips had invested in the mine undertaking."

Q. "Now you say 'he'; you mean Father Bubacz told you that Mr. Phillips had invested?"

A. "Yes."

Q. "Now, as a matter of fact, Bishop Rhode, Father Bubacz displayed to you a letter written by Mr. Phillips to Mr. Suetter concerning this property; isn't that true?"

A. "I don't recollect that fact."

Q. "Well, is it possible that it is true and you don't recollect it?"

A. "Well, that is a technical question, it seems to me. It may be possible and it may not be possible."

The Court: "Bishop, you are always metaphysical."

Witness: "Indeed; indeed, your Honor. It is not excluded."

Mr. Prendergast: Q. "Bishop, you are not denying that [42] Phillip Suetter——"

Mr. Prendergast: "Withdraw that.——"

Q. "You are not denying that you ever saw——"

Mr. Dillard: "If your Honor please, I object to him including the word 'denying' in the question. They are arguing, attempting to argue with the witness like that."

(Testimony of Bishop Paul P. Rhode.)

The Court: "Well, I think you had better reframe the question."

Mr. Prendergast: "Did you ever at any time see any letters or statements from Mr. Phillips, of the Link Belt Company, addressed to Mr. Suetter, or Archbishop Beckman?"

A. "As far as I can remember, I never saw a letter from him."

Q. "Did you ever talk to Mr. Phillips?"

A. "Never. Oh, pardon me. I think he was introduced to me in the Court the first day. That was all."

Q. "You mean here in this Courtroom?"

A. "Yes, on the first day I arrived."

Q. "Were you present on the occasion of Mr. Phillips displaying motion pictures in Chicago at the Stevens Hotel?"

A. "I knew nothing about that."

Q. "Now, Bishop Rhode, before investing thirty thousand dollars in this property, did you make any independent investigation of the properties?"

A. "No, I made no independent and personal investigation."

Q. "Upon the occasion of your first meeting with Phillip Suetter what did he display to you in the way of reports upon the properties in Oregon, if anything?"

A. "What did he require of me?"

Q. "What did he display to you? Did he

(Testimony of Bishop Paul P. Rhode.)

display to you any reports or anything on these properties?" [43]

A. "No. Once on one occasion, one of his visits, he displayed a vial or a bottle of black gold dust, I believe."

Q. "A bottle of gold dust?"

A. "Yes."

Q. "And what did he tell you about the property?"

A. Well, no. As regards his bottle of gold dust he said it was the highest—it had the highest content of gold, I believe it was the most valuable form. There were some nuggets in there I think also. And as regards the property, as I have already stated, in the beginning he said that it was property that had been worked, on which surface workings had been done in part; that owing to lack of water and machinery all organized efforts had been discontinued, it seems, and still there was gold practically everywhere where you would throw a pickaxe, I believe, and that there was no question at all that with proper equipment considerable recovery could be obtained. He spoke in a general way."

Q. "Now, as I understand, Bishop—and may I repeat just a moment?"

A. "Yes."

Q. "The first time Hogan came to you, before you ever met Suetter——"

A. "Yes."

(Testimony of Bishop Paul P. Rhode.)

Q. "—and tried to interest you in the properties, and went so far as to offer to give you some of these properties, or units, you turned him down and said you were not interested?"

A. "That is true."

Q. "Approximately a year later, not more than two years later, when you met Phillip Suetter——"

A. "Yes."

Q. "And the first time you met him——"

[44]

A. "Yes."

Q. "—you offered to invest your money in these properties?"

A. "True."

Q. "Is that true?"

A. "Yes."

Q. "And did you invest \$30,000.00?"

A. "Not then but——"

Q. "No, but over a period of time?"

A. "Over a period of time, yes."

Q. "You were willing to, and did, the first time you met Suetter——"

A. "Yes."

Q. "Start your investment?"

A. "Yes."

Q. "And you testified that all he did was show you a bottle of gold and tell you——"

A. "No; pardon me."

Q. "—that it was the best——"

A. "Not on that occasion. I beg your pardon. One visit later on."

(Testimony of Bishop Paul P. Rhode.)

Q. "Upon what did you change your opinion of these properties?"

A. "On this: Because there was a difference, an essential difference, between the contract shown me by Mr. Hogan and the contract of which we have a copy here."

Q. "And what was the essential difference?"

A. "There was this: At first it was unsatisfactory, owing to the get-up—I did not memorize that, you know—while the second offering, with this trust agreement as a basis, appealed to me."

Q. "Were you interested in the documents or were you interested in the property?" [45]

A. "I was interested in what constituted the basis of any activity, or of any interest in the matter."

Q. "What was your primary interest in making the investment, in the gold properties or the trust agreement?"

A. "In the trust agreement as leading to a profitable and easy investment and a safe investment."

Q. "I believe your words were that, as far as the representations made to you by Mr. Suetter upon the occasion of the first visit, or some subsequent visit, they were, that with capital, and with machinery, and at a proper depth, that a considerable recovery could be had?"

A. "Yes."

(Testimony of Bishop Paul P. Rhode.)

Q. "In the past there had been a lack of water but that Suetter had acquired, or was acquiring, certain water rights, which would enable the mine to operate, with adequate machinery?"

A. "Yes.

Q. "And that fact experts agreed upon?"

A. "Yes."

Q. "Suetter represented that some twenty holes had been sunk in the property and that the showing made from the tests of these holes confirmed the findings of engineers; is that correct?"

A. "More or less. Of course, your wording and Mr. Suetter's wording is slightly different."

The Court: "Well, he is merely giving a summary of your testimony."

The Witness: "Yes."

The Court: "Bishop Rhode."

The Witness: "Very well."

The Court: "Those were the substance, such as title and the manner of handling, the substance of the things you testified to this morning?" [46]

The Witness: "Yes."

Mr. Prendergast: Q. "What happened to the trust certificates that you received from Phillip Suetter for the money you paid him, Bishop Rhode?"

A. "The certificate? In due time, when difficulties arose between Archbishop Beckman

(Testimony of Bishop Paul P. Rhode.)

and Mr. Suetter and the case evidently came to the notice of the Securities and Exchange Commission——”

Q. “Now, do you know that, as a matter of fact, that it had come to their notice at that time?”

A. “I don’t know, but here is what happened. I was visited in succession by two gentlemen who showed me credentials of their——”

The Court: “I think we had better not go into that because you cannot testify to what they told you, Bishop. Let’s read the question again. I think that merely calls for what became of the certificates, and you can state that, as what we lawyers call, an ultimate fact.”

The Witness: “An ultimate fact?”

The Court: “Without narration of how it came about.”

The Witness: “This certificate, at present recollection, went over to the representative of the Securities and Exchange Commission or the Federal Income Bureau. I cannot say to which one of the two it went but it went to one of them.”

The Court: “All right.”

Mr. Prendergast: “Possibly my question was confusing, Bishop. I should ask it this way: Are you still the owner of the units?”

A. “Yes.”

Q. “So, you are still the owner of units in the Suetter Placer Mine?”

(Testimony of Bishop Paul P. Rhode.)

A. "Yes."

Q. "Are you a stockholder, or do you have any interest in the [47] Hercules Mining Corporation?"

A. "No."

Q. "Did Monsignor O'Laughlin at any time ever give you any interest in the Hercules Mining Corporation?"

A. "I have never seen the gentleman."

Q. "Whether you have seen him or not, did you receive from Archbishop Beckman, Monsignor O'Laughlin, Charles Reames, or a man by the name of McCormick, any interest in the Hercules Mining Corporation?"

A. "No."

Q. "Do you know what the Hercules Mining Corporation is?"

A. "I know at present that it is supposed to be a new organization to work the Hercules Mine."

Q. "And the Hercules Mine was one of the mines that Phillip Suetter had put into the Suetter properties; is that correct?"

A. "The Hercules Mine, as far as I am concerned, came into being later on, after he began buying mines around there. I have never had any interest, either moral or financial, in any of those mines. I invested my funds in the Suetter Placer Mines solely, and refused to

(Testimony of Bishop Paul P. Rhode.)

have anything to do with the other discoveries of gold there in Oregon.”

Q. “Isn’t it a fact that Archbishop Beckman, in a settlement with Phillip Suetter and the taking over of these mines which were later put in the Hercules Mining Corporation, gave you an interest in the property?”

A. “Gave me—pardon me—gave me an interest in the——”

Q. “In the property——”

Mr. Dillard: “If your Honor please, I object to that.”

The Court: “I will sustain the objection. It is immaterial. When they recover money subsequently it is not material. The law covers a scheme or device for defrauding. I thought you were going to [48] ask these questions to show possible interest or bias, something like that, but the mere fact that he may have received shares from others, or that he may have received money, is not material after the fraud is perpetrated.”

Mr. Prendergast: “That is not what we were intending to prove, your Honor. That is not the intention of the questions. All of these letters set forth in the indictment are letters written after June, 1939.”

The Cour: “I understand that.”

Mr. Prendergast: “And they all refer to other mining properties after a settlement was

(Testimony of Bishop Paul P. Rhode.)

made. They have nothing to do with the initial agreement. Now, this man is charged with violation of the Securities Act and Mail Fraud, upon a representation, which counsel has asked him about, that took place in the East, and in the meantime—and this witness has so testified—there was a settlement of two lawsuits, one by Archbishop Beckman and one by himself.”

The Court: “That wouldn’t end the matters so far as the Government is concerned. There might have been two settlements, and if he continues to use the mails in persuance of the scheme to defraud, if he just goes on and runs the property afterwards and all these mining ventures which came to the attention of the Court are private affairs and private settlements between the parties, they are no concern or materiality at all. The only materiality would be to show bias or interest of a particular witness, either by showing that he had brought out or had controversies, or something like that.”

The Witness: “I beg your pardon, your Honor, may I——”

The Court: “Just a minute. I am talking.”

[49]

The Witness: “All right.”

The Court: “I am talking to counsel on a proposition of law.”

The Witness: “Yes.”

Mr. Prendergast: “If the Court please, I

(Testimony of Bishop Paul P. Rhode.)

am sorry I don't make myself clear yet. I hesitate to say certain things in front of the jury."

The Court: No, no, don't hesitate to say anything in front of the jury. If you go out of the way in arguing the facts I will tell them. I will tell them nothing you state should be considered except as argument."

Mr. Prendergast: "I told the jury that, too, in my opening statement."

The Court: "All right."

Mr. Prendergast: "I am not testifying."

The Court: "I don't want to hear any further argument. The witness has answered the question in the negative about the Hercules Mine. If you ask him the question the answer will be received. I will allow you to receive it, but I will instruct the jury at the proper time the money he got out, even if he got back all of his money, if there was a scheme or device to defraud in the sale of units there is still liability."

Mr. Prendergast: "I have no question about that at all, your Honor."

The Court: "All right."

Mr. Prendergast: "We agree with your Honor in that."

The Court: "I will let you answer the question. It will take less time to have it answered. Unless we move a little more rapidly, I will become a little more active in the proceedings than I have been. I am trying not to

(Testimony of Bishop Paul P. Rhode.)

do that, but we are moving rather slow, very, very slow. So read the last question and I will have the Bishop answer it. I know his previous answer indicated it would [50] be negative anyway, but read it again, Mr. Person, please. It begins with, "Isn't it a fact."

The Court: All right. You may answer the question, Bishop. If it is a question that you can't answer "yes" or "no", you may explain. It is better to give the answer and then give the explanation.

The Witness: Pardon me, what was the wording of that, please—gave me an interest? Is that the idea?

The Court: Well, yes; he meant gave you. You didn't mean offer him, did you?

Mr. Prendergast: No. I meant delivered it to him.

The Court: Delivered.

A. Here is what happened: I was tendered a certificate of 84 shares in the Hercules Mine by the Reverend Stephen Bubacz, and I refused to accept them.

The Court: All right.

Mr. Prendergast: Q. Referring to the Government's Exhibit 68, which is a letter dated July 27, of 1939, addressed to Phillip Suetter and signed by yourself, Paul P. Rhode, Bishop, may I ask what you meant by the statement: "but as a general proposition I am

(Testimony of Bishop Paul P. Rhode.)

of the opinion that you should confine your efforts to bring in one mine, the Josephine, into production and let everything else go"? What did you mean by "everything else"?

A. I mean everything else. I mean those—I mean the other mines that were named from time to time in the letterheads, I believe, and his reference to California Mine and other mines. I had nothing to do with that and I wanted him to remain true to the terms of the contract, of the trust agreement.

Q. Referring to Government's Exhibit 69, which is a letter from Phillip Suetter addressed to the Most Reverend Paul P. Rhode, dated August 25, 1939, under the letterhead of the Oregon Mining Investment Company, Incorporated, "Used the check you sent me to purchase some equipment especially a new tractor as I had little luck in getting the use of the one in California. [51] You know I was to have the use of the one turned over to the Archbishop but they seem to have it busy all of the time. I did not want any trouble with Monsignor so deemed it advisable to buy one of my own." What was your understanding from that paragraph in that letter in regard to his inability to get the tractor from the Archbishop on the California property?

A. My understanding was that the Archbishop and the Monsignor, and so on, were

(Testimony of Bishop Paul P. Rhode.)

conducting an enterprise of their own, with which I would have nothing to do.

Q. Did you have any objection to Phillip Suetter using these funds that you were sending him to purchase the equipment for the operation of the Josephine Mines?

A. I did not know that he was using those funds in that way.

* * * * *

Q. Bishop Rhode, I am now referring to the Government's Exhibit 70, which is a letter dated November 22, 1939, addressed to you, Reverend Paul P. Rhode, Green Bay, Wisconsin, written by Phillip Suetter, and after stating that upon Suetter's arrival west he found one of his men had broken his leg in four places and found things in a difficult situation, "However, this Monsignor here has never tried to use anything toward me but malice. For your information, I have news presented to me that he has been to a certain attorney's office with his attorney, tried to accuse me of forging some writing on those notes." Do you know the notes he referred to by that?

A. I don't know.

Q. Do you know of any notes that were involved in these transactions at all?

A. What notes in particular, please, do you refer to?

(Testimony of Bishop Paul P. Rhode.)

Q. Well, first of all, I am referring to this wording in this letter about some notes, but you say you don't know what he referred to; is that correct—that you didn't know what notes he referred to?

A. I know of nothing definite. There is no definite note that I might connect up with the statement of Mr. Suetter there.

Mr. Prendergast: May I have this marked for identification, please?

(Letter marked Defendant Exhibit 72 for identification) [52]

Mr. Prendergast: Will you please hand the Defendant's Exhibit 72 for identification, Bishop Rhode, and tell us if you can identify the same.

A. I identify this note, this letter.

Q. You didn't?

A. I identify it, I say.

Q. You identify that letter? A. Yes.

Q. And that is what?

A. That is in reference to a loan the Archbishop sought to obtain from me and this loan was extended to him as the Archbishop of the Archdiocese of Dubuque, and it was extended to him with the stipulation that it was to him personally, with responsibility exclusively and entirely his and no one else's. The amount advanced to him on his personal note has nothing to do with Mr. Suetter or this trial.

(Testimony of Bishop Paul P. Rhode.)

Q. Why did you write a letter to Mr. Suetter about that now?

A. Because Suetter evidently had some understanding with the Archbishop as regards further assistance from him and he sent me his letter with one of these notes that were being disposed of. I returned this to the Archbishop and I told him "Our understanding was that this will be a personal loan and I will accept no paper on which Mr. Suetter's name figures." That was the end of that matter.

Mr. Prendergast: May I have the letter, please?

The Witness: Yes.

Mr. Prendergast: This letter bears your signature, does it, Bishop Rhode? It is dated April 10th, 1938. A. Yes.

Mr. Prendergast: If the Court please, at this time I move the admission of Defendant's Exhibit 72 for identification.

Mr. Dillard: May I glance at it, please?

Mr. Prendergast: Yes. Pardon me. [53]

Mr. Dillard: (after examining paper) No objection.

The Court: Received.

Mr. Prendergast: Bishop Rhode, may I read this Defendant's Exhibit 72 to Mr. Phillip Suetter, Chicago, Illinois, dated Green Bay, Wisconsin, April 10, 1938:

(Testimony of Bishop Paul P. Rhode.)

“Dear Mr. Suetter:

“I have made arrangements with Archbishop Beckman enabling him to assist you with ten thousand dollars.

“To effect this he took the note which you had kindly left with me and gave me in its place another more suited to my purpose. I hope that this will make no difference to you provided that you get the help you are in need of.

“No doubt the Archbishop will get in touch with you during the next few days.

“As matters stand at present, I will not be able to contribute any more; if they change for the better, I will gladly give you what be in my power.

“I suppose that you can be reached at the Stevens Hotel. When you leave the West please notify me.

“Wishing you a happy Easter and all success in your venture, I am,

Sincerely yours,

PAUL P. RHODE,

Bishop.”

Q. This letter states that you made arrangements with Archbishop Beckman enabling the Archbishop to assist Suetter with ten thousand dollars? A. Yes.

Q. What arrangements were those?

A. Namely, the ones that I have already

(Testimony of Bishop Paul P. Rhode.)

touched upon; that I would extend a loan to the Archbishop of \$10,000.00 on his individual and personal responsibility and cognizance. Now I don't know what transpired between the Archbishop and Mr. Suetter. Mr. Suetter is evidently under the impression——

Q. Well, just a moment. I am sorry, I can't ask for your impression.

The Witness: All right. Very well.

Q. You state further, "To effect this"——

A. Yes.

Q. ——the Archbishop took the note "which you had kindly left," which Suetter had left with you? [54] A. Yes, sir.

Q. And you say Archbishop Beckman gave you in its place another more suitable to your purpose? Now what was the difference in those notes?

A. Simply this, as I have already stated: That I would not take any of the mining guaranties and Mr. Suetter's signature. My dealing in this case was directly with the Archbishop, for him to make use of this money as he saw fit. Now I did not directly contradict Mr. Suetter for the sake of——well, you might say courtesy. That was all.

Q. In other words, the note that the Archbishop had left with you was a note on the Archdiocese; is that correct?

A. The first note was signed by both of them and I refused to accept that and I told

(Testimony of Bishop Paul P. Rhode.)

Archbishop that he knew the understanding, that it was to him—the loan was made to him and not to anybody else.

Q. Bishop Rhode, I am sorry to have to repeat the question. The first note was a note signed by Archbishop Beckman on the Archdiocese of Dubuque, payable to Phillip Suetter; is that correct or not? A. No.

Q. How was the first note made out?

A. The first note sent to me was a note signed by the Archbishop and by Mr. Suetter, and I returned the Archbishop the note and told him that was not the agreement; that I would accept his signature only.

Q. The first note that was sent to you was a note payable to you, signed by Archbishop Beckman and Phillip Suetter?

A. And Phillip Suetter.

Q. And you refused to take a note with Phillip Suetter's name on it?

A. I refused to take that, yes.

Q. And that was some time prior to April 10, 1938; is that correct? Your letter was dated April 10, 1938.

A. Well, very well, then; the date stands. Naturally so.

Q. Did you discuss this mining property with Archbishop Beckman? A. No. [55]

Q. Did he make any report to you at any time? A. No, not to any extent.

(Testimony of Bishop Paul P. Rhode.)

Mr. Prendergast: May I have this marked for identification.

(Letter, Defendant's Exhibit 73 for identification.)

The Witness: May I correct myself to one extent.

Mr. Prendergast: Yes, you may.

The Witness: On one occasion I did—we met—we did converse on this subject. That was the only time, it seems to me—well, maybe another time, too. But the purpose was really not expressly about the mine, but the proposition was brought up.

Q. Well, did you discuss the mine?

A. To an extent we did, yes.

Q. Would you please hand the witness Defendant's Exhibit 73 for identification and ask him to examine the same.

A. This refers to a conversation that I alluded to.

Q. Yes. This is your signature on there, Bishop Rhode? A. Pardon?

Q. That is your signature on that exhibit?

A. This is my signature, yes.

Q. And the date is what, please, on that exhibit? Will you give us the date of that letter?

A. The date of this letter is April 7th, 1939.

Mr. Prendergast: May I have it, please, Mr. Bailiff? May I have admitted into evi-

(Testimony of Bishop Paul P. Rhode.)

dence Defendant's Exhibit 73 for identification?

Mr. Dillard: No objection.

The Court: It will be received. (Received)

Mr. Prendergast: Referring to Defendant's Exhibit 73 may I read this to you, Bishop Rhode.

"Bishop's Residence, Green Bay, Wisc. Box 65, April 7, 1939.

"Mr. Phillip Suetter, Grants Pass, Oregon

"Dear Mr. Suetter: I have had a talk with the Archbishop. It was quite interesting and gave me a better understanding of the situation at the camp. [56]

"I wish that I were better fixed financially but as intimated before, I have practically come to the end of my means. I will however do what I can to help you round out your equipment, though it be not much that I can do.

"Enclosed please find check in payment of two additional units. Kindly make out a certificate and mail same to me.

"If you could give me time enough, perhaps I will be able to contribute a little more. Kindly therefore write me when at the very latest payment must be made. I would like to have as much time as possible. It may be that I will be able to raise two or three more.

"Well, continue the good work you are

(Testimony of Bishop Paul P. Rhode.)

doing and may success crown your efforts.
Wishing you a happy and blessed Easter, I
am,

Sincerely yours,

PAUL P. RHODE,

Bishop''

Q. Am I correct in understanding that you discussed this mine with the Archbishop, who had formerly, from the letter, inspected the property? A. Yes.

Q. And after that, after discussing the properties with the Archbishop, some time prior to April 7, 1939, you then wrote for two additional units? A. Yes.

Q. And was this offer to purchase two additional units based upon what you learned from the Archbishop?

A. Yes. I took his statement as sort of a recommendation, and partly it was owing to his—owing to that I decided to.

Q. Now do I understand correctly that you testified this morning just before lunch that you were still the owner of Suetter Placer Mine Units or certificates. A. I am.

Q. I believe that the last question that counsel for the Government asked you, Bishop, this morning, was in reference to a law suit. Counsel asked you if it is not true that you filed a law suit against Suetter and that you settled the case with Suetter and released Suetter

(Testimony of Bishop Paul P. Rhode.)

from any liability and had the case withdrawn; is that correct? A. Correct.

Q. And he read to you from same instrument, which he has not introduced into evidence, but asked you if all liability for any claims by Suetter [57] by you against Suetter, were released, of every kind and nature; is that correct?

A. I didn't quite understand your question, Mr. Prendergast.

Q. Do I understand correctly that settlement of that law-suit—that in the settlement of that law-suit you released Suetter from any claims of any kind and nature? A. Yes.

Q. What was the consideration for that settlement?

A. The Archbishop urged me to desist in that lawsuit because of the notoriety and at the same time pledged me that he would take care of the funds invested by me, and those were his words: "I will take care of you."

Q. Yes. And it was about that time that the Archbishop took over this Hercules Mining Corporation and took over these Hercules properties and was operating independently, as you have testified—independently from Suetter; that is correct isn't it?

A. I must beg your pardon, but will you kindly give me that again.

Q. Yes, I will be glad to. At that time the Archbishop had taken over certain properties

(Testimony of Bishop Paul P. Rhode.)

from Suetter which were put into another corporation called the Hercules Mining Corporation, and which you have testified here this morning the Archbishop and others than Suetter were operating independently?

Mr. Dillard: Just a minute. Excuse me. I just want to inquire whether it appears that the question is calling for some hearsay answer by the witness. I doubt if he knows the facts that they are inquiring about.

The Court: Well, I think the Bishop probably understands that he can testify only to facts which came to his knowledge; not hearsay, something he heard from someone else.

Mr. Prendergast: Am I correct in this statement: That this morning you testified that there had been some adjustment, some settlement, [58] some compromise or agreement between Phillip Suetter and the Archbishop?

A. Yes.

Q. Through which the Archbishop took over certain of the mining properties from Suetter as part of the transaction, and that those mining properties were put into another corporation, which Suetter had nothing to do with, and which the Archbishop and this other group were operating themselves?

Mr. Dillard: Excuse me. If the Court please, if I remember correctly, he said he understood something like that had taken place, all I want to object to is asking the witness to

(Testimony of Bishop Paul P. Rhode.)

try to testify to something he could only know by hearsay. That is not proper cross-examination for that reason.

Mr. Prendergast: Q. Maybe this will refresh your memory, Bishop, you said that Father Bubacz then offered you eighty four shares in the Hercules Mining Corporation and you refused to accept it.

A. Then. When and where, I would like to know?

Q. I don't know. You testified later Father Bubacz offered you eighty-four shares in the Hercules Mining Corporation. You didn't say when and where.

A. Very well. I also testified to this fact: that I was not involved in any of their purchases and undertakings and doings; that my activity and interest was limited to the placer mining, Suetter Placer mine, and as regards these other operations, and so on, Mr. Dillard I believe stated what I knew was only by hearsay, and it was a surprise to me when I was offered eighty-four shares in these other mines, whatever they were.

Q. But, Bishop, what I am particularly talking about now is your statement, just made a few minutes ago, that the consideration for your settlement with Suetter was an agreement upon the part of the Archbishop to take care of you so far as the monyes that you had invested. [59]

(Testimony of Bishop Paul P. Rhode.)

A. Whether that was the understanding between me and the Archbishop, that he would?

Q. You have testified to that. Was that the understanding?

A. That he would—as I said, he used the words: “I will take care of you.”

Q. Yes. And how did you understand he would take care of you?

A. Well, that remains to be seen, as to whether he will do anything.

Q. Yes, but you did not accept the eighty-four shares of stock?

A. No, I did not.

Q. In the Hercules Mines?

A. I did not.

Q. Now what was your understanding in making this settlement with Mr. Suetter, about whether or not you would, after settling with him, continue to maintain ownership in the properties that he claimed? In other words, how can you now claim—how do you now claim ownership in the Suetter Placer Mines by reason of these certificates if you have already settled all claims?

A. I claim ownership of these certificates on the basis of my payments made to him.

Q. But the Archbishop has agreed to pay you back for that?

A. That remains to be seen, whether I will recover or not. I hope I will.

(Testimony of Bishop Paul P. Rhode.)

Q. If the Archbishop does not pay you, then you are going to hold these units?

A. Of course.

Q. Yes. And you still consider them of value?

A. Well, that remains to be seen, too. You can't attribute that to me under the circumstances, I think.

On re-direct examination, after identification by the witness, Bishop Rhode, Government's Exhibit 74 was admitted, a letter that reads as follows:

"Reverend Paul P. Rhode, Dec. 16, 1939
"Box 65, Green Bay, Wisconsin.

"Dear Bishop: Having just returned from the East, and from Medford [60] tonight, I am writing you just a few lines.

"I was informed by my attorneys that you had written them. I also received indirectly a rumor that my payment on my contract of settlement due me on February 3rd. may not be paid.

"For your information, and others you might possibly come in contact with, if that is not (in) my attorneys hands on the 4th. of February Reverend Archbishop Beckman will find a lawsuit in Dubuque, Iowa, filed against him and the diocese. I have spent better than seven thousand dollars, all on their account, and personally Bishop, I am hurt and disgusted.

"If they are looking for additional publicity

(Testimony of Bishop Paul P. Rhode.)

they are going to recieve it this time at home. This is not a threat, but a promise. The Archbishop assumed your interest; however this does not matter. I own other interests besides the mines. Everything I have done for the Archbishop's interest, but this manager of his, well, his own record of Lincoln where he was born and raised speaks for itself.

"At the present writing I am just simply not able to give you any immediate relief. They have taken my surplus trying to protect you and myself as well as the Bishop, all on account of the false charges which were filed against me here, which am sure they will answer for sometime.

"We have started operating the Josephine last week. It was the first water we had. The bulk of our investment is in the mine which the Archbishop controls, and you know that. Now they took a \$9,000.00 new tractor and an Armstrong Drill cost \$4,300.00, with all the tools, two Ford autos, Federal truck and air compressor cost \$1,700.00. The autos cost better than \$1,800.00. One International truck $\frac{3}{4}$ ton cost \$960.00. Practically all out of your investment. Therefore to get this straightened around your cooperation and no one will get hurt, and the cash money of \$3,000.00 I need you sent me in the early part of '39 went for rails and electric wiring and buildings. Now the Archbishop project which you have an in-

(Testimony of Bishop Paul P. Rhode.)

terest in and always did have providing the Archbishop does not let O'Laughlin wreck him the same way he did in Lincoln.

“Bishop, please realize this. I am not going to make any promises that I cannot fulfill, but your investment you made through me you will never lose a dime!

“I sincerely hope your operation is successful, and I offer up my prayers for you tonight.

Your Friend,

PHILLIP SUETTER

The Court: Any further questions?

Mr. Prendergast: May I inquire about this letter?

Mr. Dillard: What?

Mr. Prendergast: Were you inquiring about this letter or just reading it?

Mr. Dillard: No; I was just reading. [61]

There was also read into the record the following portion of the deposition of the defendant, Philip Suetter, taken on January 3, 1941, in Portland, Oregon, in connection with the case of Rhode vs. Suetter, a civil case in the United States District Court for the District of Oregon:

“Q. To what extent were mining operations conducted on the California properties; that is, the Ajax and Mt. Reubens Group?

A. I just judge about \$90,000 worth of development.

Q. Was that work you conducted yourself?

(Testimony of Bishop Paul P. Rhode.)

A. Yes, well—myself and foreman. I had an engineer named Hayton work for me just a short time.

Q. William F. Hayden?

A. I don't know his initials. He used to be at Grants Pass, and back there somewhere he used to work for me.

Q. Where did you receive the money for that development work that you speak of?

A. I had some money of my own and I got some from Archbishop Beckman, and \$3,000 of that came from Bishop Rhode.

Q. That went into those properties?

A. Well, it went into part of it for equipment and so on." [61-A]

The Court: Any members of the jury desire to ask Bishop Rhodes any questions?

A Juror: May I ask a question?

The Court: Yes.

The Juror: Where did you get your competence and all to invest thirty thousand dollars through Mr. Suetter?

A. I largely took that step on my own responsibility, trusting that what I heard in regard to Mr. Suetter, and later on learning that the charges which had been preferred against him in Indiana and Illinois, I believe, had not been sustained, that he was declared innocent, I think, or at least exonerated. And what I learned from time to time from Mr. Suetter as he went along, because for a long time there

(Testimony of Bishop Paul P. Rhode.)

was really no trouble whatsoever, everything seemed to go along in the normal and satisfactory way, until that unfortunate break took place, and so I assumed full responsibility for the investment which I made.

ARCHBISHOP FRANCIS J. BECKMAN,

was thereupon produced as a witness for the United States and he testified that he had met the defendant, Phillip Suetter, in 1936; that said meeting was at the Stevens Hotel in Chicago, Ill., that those present were Archbishop Beckman, Phillip Suetter, William Phillips of the Link-Belt Co., Father Klott, manager of the Archbishop's College and a mining engineer named Diax for the Archbishop's interests; that Suetter described the property and told Archbishop Beckman that machinery was needed; that they all discussed the property and inquired if the land had been tested; that Beckman was informed that some 20 test-holes had been dug.

Archbishop Beckman further testified that the defendant, Suetter, represented himself as sole owner; that there was gold on the property; that Phillips, engineer of the Link-Belt Co., agreed to this and so informed Archbishop Beckman; that Phillips insisted the gold was there and that he, Phillips had made a personal test of the gold content of the property; that Suetter informed Beckman that Phillips was investing in the property

(Testimony of Archbishop Francis J. Beckman.)

as were other Link-Belt employees; that Phillips was also interested in managing the property on a royalty basis. [62]

Archbishop Beckman testified that he had first heard of the Suetter Placer Mines from Mr. Ed Hogan, who told him that he understood that the Archbishop wished to build a seminary and that he (Hogan) had a way of helping to finance it through an investment in the Suetter Placer Mines.

Archbishop Beckman further testified that later on Suetter told him that Hogan was not the owner of the property, that he, Mr. Suetter, was the owner and that he had sent Hogan out to represent him and raise cash for him, that Suetter thereupon delivered two units of Suetter Placer mines for \$2,000 which the witness, Beckman, had already paid Ed Hogan.

Archbishop Beckman further testified that he asked Suetter whether he had clear title to the property, to which Suetter replied that he had clear title to it and was the sole owner.

The witness further testified that Suetter told him that Philips was investing \$5,000 and that the employees of Link Belt Company were putting in \$80,000. [62-A]

Archbishop Beckman testified that Suetter later informed him when he had returned the money to the Link-Belt people when he decided not to purchase machinery from Link-Belt.

The further testimony of the witness was that he had given the defendant checks in varying sums

(Testimony of Archbishop Francis J. Beckman.)
when the defendant Suetter, needed money to buy equipment; that he Archbishop Beckman, executed promissory notes to be discounted only to Archbishop Beckman's personal friends; that at first the notes were only personal obligations but were later changed to read "The Archdiocese of Du-buque, by Francis J. Beckman, Archbishop".

The United States thereupon offered in evidence Govt's. Exhibit 76, a group of cancelled checks, identified by the witness, Archbishop Beckman, as checks drawn by him, and payable to the defendant, Phillip Suetter, on the following dates and for the following amounts:

Feb. 5, 1937	\$ 600.00
Feb. 11, 1937	\$ 500.00
March 11, 1937	\$1,000.00
April 26, 1938	\$ 100.00

The United States further offered into evidence, after identification by the witness, Archbishop Beckman, Govt's. Exhibits 77 and 78, the same being "Units" in the Suetter Placer Mines, running in favor of the witness and signed by the defendant Suetter and being identical in form with Govt's. Exhibit 40 heretofore set out.

The U. S. also offered in evidence, after identification by the witness, Govt's. Exhibit 79, dated March 28, 1938, which reads as follows:

"Terms of Agreement in re Suetter Placer mines located in Josephine County, Oregon.

"Know All Men by These Presence:

(Testimony of Archbishop Francis J. Beckman.)

“First: That I, Phillip Suetter, of Portland, Oregon, undersigned herewith, own clear title to the following mining premises located in Josephine County, near Kerby, in the state of Oregon, to-wit:

“(a) The Hunt and George Mine,” not reading the full description.

“(b) The Mud Flat placer claim;

“(c) The Whiteside No. 2 placer claim;

“(d) The Watts extension No. 1 placer claim;

“(e) The Triangle placer claim;

“(f) The Stockbarger placer claim;

“(g) The Battle Bar placer claim;

“(h) The Missing Link placer claim;

“Second: That a considerable portion of the funds for the purchase of the above described Suetter Placer Mines in Josephine County, State of Oregon, were attained from the sale of certain promissory notes signed [63] by Francis J. L. Beckman, as Archbishop of Dubuque, Iowa, payable to the order of Phillip Suetter at the American Trust and Savings Bank in Dubuque, Iowa.

“Third: That approximately ninety-five thousand dollars have been invested by Phillip Suetter in the Suetter Placer Mines in Josephine County, Oregon from his own estate and from his personal sources of income.

“Fourth: That the builders of all mining machinery and equipment, now used or to be

(Testimony of Archbishop Francis J. Beckman.)

used at the Suetter Placer Mines in Josephine County, Oregon, will furnish complete itemized statements of all costs whatsoever to Phillip Suetter, who does hereby obligate himself to submit true and identical copies thereof to the Archbishop Francis J. L. Beckman at Dubuque, Iowa.

“Fifth: That complete and detailed financial reports with appropriate inventories pertaining to and covering all transactions involving the Suetter Placer Mines, in Josephine County, Oregon, will be transmitted by Phillip Suetter, undersigned herewith to Archbishop Francis J. L. Beckman at Dubuque, Iowa, whenever so requested.

“Sixth: That all net proceeds from the operation of the said Suetter Placer Mines in Josephine County, Oregon, shall be remitted by Phillip Suetter, undersigned herewith, to Archbishop Francis J. L. Beckman at Dubuque, Iowa—after deducting the costs of labor and actual operating expenses in connection therewith—until all outstanding Promissory Notes, issued on this mining project and given to Phillip Suetter by Archbishop Francis J. L. Beckman are fully paid with interest accrued to date of such redemption.

“Seventh: That all books, receipts and accounts shall be always open and available for inspection and examination by duly authorized

(Testimony of Archbishop Francis J. Beckman.)

representatives of Archbishop Francis J. L. Beckman.

“Eighth: That this instrument signed by Phillip Suetter, of Portland, Oregon and given under seal, properly attested, to Archbishop Francis J. L. Beckman, is intended to serve as a supplement and addendum to the Suetter Placer Mines Trust Agreement, already executed and delivered, covering interests and rights of the respective parties.

“Ninth: That any and all properly accredited assigns are empowered hereby and instructed to make equitable and honest adjustment of Phillip Suetter’s obligations towards Archbishop Francis J. L. Beckman and the Archdiocese of Dubuque, Iowa, in case of his death, serious illness or inability to act.

“Tenth: That the lawful heirs of Phillip Suetter are urgently requested and hereby authorized to carry out all the promises and representations herein elucidated, in strict accordance with the desires, instructions and intentions of Archbishop Francis J. L. Beckman to whom the undersigned, Phillip Suetter, is indebted in divers ways and means, beyond hope of adequate reciprocity or sufficient recompense.

“In Witness Whereof, I, Phillip Suetter have hereunto set my hand and seal this 26th day of March, A. D., 1938”. (Signed) Phillip Suetter.”

(Testimony of Archbishop Francis J. Beckman.)

To the admission of said Exhibit the defendant then and there duly objected on the grounds and for the reason that the same was irrelevant and incompetent, that the [64] government should elect as to which count or counts in said indictment the evidence was directed, and the purpose for admitting said document into evidence. Counsel for the United States contended that said Exhibit showed continuous false representations by the defendant. The Court overruled the objections and counsel for the defendant duly excepted to said ruling.

With reference to Government Exhibit #79, dated March 28, 1938, set forth on Page 63 of the Bill of Exceptions, Archbishop Beckman testified as follows:

“Q. Who delivered it to you?

A. Why, Mr. Suetter.

Q. Was it delivered to you as a result of some payment you made to Mr. Suetter for the interest in these so-called Suetter Placer Mines?

A. It was delivered to me as the result of my insistence that he get an account of my moneys that I had given him. He didn't keep——

Q. At or about the date it bears?

A. Yes. He didn't keep any books. Every time I saw him or communicated with him I asked him, ‘When are you going to give me

(Testimony of Archbishop Francis J. Beckman.)

an accounting?' He said, 'Well, I have got it all in my pocket. I am making it out. I will have a perfect accounting for you pretty soon.' Well, nothing came of it, and I says, 'Look here, anything happen to you any time where would I be? In the first place, I want you to insure your life to cover me.' Well, he claimed he had applied for insurance but he was over weight and he couldn't get the insurance he wanted. Then I said, 'I insist now that you have got to give me an accounting. This is no way of doing business. And, secondly, I want some kind of an agreement drawn up.' And this was the result, but I wasn't satisfied with it. From this agreement you would think that he and I were the only ones that owned the Josephine mines. There were others interested in it, too. It was mainly ours. It says before anybody——"

Archbishop Beckman further testified that subsequent to the date of the execution of the agreement (Government Exhibit #79) he borrowed \$40,000 from the Des Moines Bank at the insistence of Suetter, who told him that all he needed was [64-A] and that he would never bother him for another cent, that the \$40,000 was needed to put up a mill, and that the mill would certainly produce; that in February, 1939, he became so worried that he made a trip to the Coast but did not find a mill on either the Suetter Placer Mines property in Oregon or the St. John Boxco in California. In

(Testimony of Archbishop Francis J. Beckman.)

answer to the question "Was there ever any mill built on the California property?" the witness answered "I didn't see any."

In reference to Exhibit 79, the witness Archbishop Beckman testified that he had no agreement in writing with defendant Suetter and he wanted some document giving him, the Archbishop, control of the properties. Archbishop Beckman further testified that he knew at that time that others, especially Bishop Rhode, Father Bubez and Ralph Montag had interests in the property. There was further admitted into evidence, United States Exhibit 82, dated May 14, 1938 at Dubuque, Iowa, in which the defendant acknowledged that he had received from Archbishop Beckman promissory notes in the amount of \$253,750.00, of which \$125,000.00 were outstanding. The document also recited that the defendant acknowledged he had received the sum of \$59,000.00 from Archbishop Beckman. The Archbishop testified that the defendant Suetter was to purchase machinery and pay expenses with money so advanced to Suetter.

Archbishop Beckman further testified that from May 20, 1938 to March, 1939 he had issued his checks to Suetter in the approximate sum of \$40,000.00. In February, 1939, Archbishop Beckman visited the property and personally inspected the same. He testified that he visited the property and they were then operating but without much result. He testified that Suetter had acquired other mining properties in California and had sold this

(Testimony of Archbishop Francis J. Beckman.)
dredge without Beckman's consent. Later Beckman was informed that Suetter had obtained certain Wheeler properties on contract the price to be taken out of ore production. He further testified that he asked the defendant for an accounting and insisted upon an agreement with Suetter giving 60% of all the various properties to Beckman and 40% to Suetter.

Archbishop Beckman testified that he had sent the defendant \$40,000.00 from Dubuque, Iowa to Grants Pass to purchase a mill to be constructed on the California property after his visit in February, 1939.

He testified that later (June, 1939) he sued the defendant Suetter, which case was settled by Beckman taking over all of the mining properties other than the original Josephine Mines; agreeing to take [65] care of the interests of Father Bubacz and Bishop Rhode, and agreeing to pay to Suetter the sum of twenty thousand dollars; that said settlement agreement was entered into in the summer or early fall of 1939.

Archbishop Beckman further testified that he found out all of a sudden that Suetter had acquired another mine called the Don Bosco or St. John Bosco, and that he took Suetter to task for not confining his operations to the Josephine property in Oregon; that Suetter said that he had found a better mine, and in reply to the Archbishop's question "Why don't you develop the Josephine?" Suetter said "The Josephine is no good. There are

(Testimony of Archbishop Francis J. Beckman.) "too many boulders. You can't work the Josephine."

Archbishop Beckman further testified that later on he found out that Suetter had abandoned the Don Bosco and had sold the gold-washing plant without permission.

Archbishop Beckman testified that he demanded an accounting from Suetter several times, and that finally he told Suetter "You have got to give me an accounting, that is your last chance or I am going to get an injunction," and that it was after that that he instituted a suit for an accounting. [65-A]

Upon identification by Archbishop Beckman, the United States offered into evidence Government's Exhibit 89, a letter that reads as follows:

THE STEPHENS

Chicago

Saturday 12/5/36.

"Most Rev. Francis G. Beckman

"Dubuque, Iowa.

"My Dear Archbishop——

"Have been waiting further word from you this week, and it has come to my mind that more information might help matters at Dubuque in the way of operation and ironing out different items, could if you thought best arrange to come to Dubuque home Mr. Gilmore along with Picture Machine which I believe would help things considerable.

"We have had notice of the price advance

(Testimony of Archbishop Francis J. Beckman.)

on all the motors steel etc. and have protected ourselves for ten *dayes*, suppose your home noticed the general advance in wages and raw materials.

“ Inclosed you will find two units as per the two thousand dollars delivered to Mr. Hogan, you will please fill out the pink copy so we will have it for our records, if any other money was advanced to Mr. Hogan either by yourself or Fr. Kessler please let me know and I will protect you.

“ As said before all machinery is advancing from five to ten percent, not only the Link-Belt but also the Keystone Drill and the Tractor Company at Peoria, but we have protected ourselves on all.

“ It will be possible to save as much as twenty to thirty thousand advance in price by putting down a small payment on the above machinery and if at all possible would like to know what we can look forward to the first of week in the way of some moneys to put with what we expect to collect here in Chicago over the next few weeks.

“ Am enclosing addressed envelope for return of the pink unit slips.

“ We thank you much for kind remembrance of us in your daily Mass and prayers in that we be guided by the Grace of God.

(Testimony of Archbishop Francis J. Beckman.)

“ Hoping that Your Self and all will see
your way to go along with this I am,

Your servant

PHILLIP SUETTER.

The United States then offered in evidence, upon identification by Archbishop Beckman, a group of cancelled checks, being Government's Exhibit 83, from the witness to the defendant, Phillip Suetter, bearing the following dates and for the [66] following amounts:

May 3, 1938	\$ 5,000.00
May 9, 1938	\$10,000.00
May 10, 1938	\$ 5,000.00
May 22, 1938	\$10,000.00
July 13, 1938 (Western Union)	\$ 557.67
Oct. 7, 1938	\$ 2,000.00
Dec. 2, 1938	\$ 5,000.00
Dec. 12, 1938	\$ 2,000.00
Jan. 2, 1939	\$ 2,000.00
Jan. 24, 1939	557.67
Feb. 8, 1939	\$ 500.00
Mar 8, 1939	\$ 7,500.00

There was also offered in evidence by the United States Government's Exhibits 84, a group of promissory notes identified by Archbishop Beckman as having been executed by him, in the amount of \$188,500.00, all marked "Returned and Cancelled". which the witness, Archbishop Beckman, testified had been returned to him by the defendant, Phillip Suetter, upon the termination of their civil suit and as

(Testimony of Archbishop Francis J. Beckman.)

part of the consideration for the settlement thereof.

There was also introduced, upon identification by the witness, Government's Exhibits 85 and 86, groups of promissory notes executed by Archbishop Beckman and sold by and on behalf of the defendant, Suetter, in amounts of \$14,500.00 and \$15,000.00, also Government's Exhibit 87, a group of promissory notes returned and cancelled by Archbishop Beckman in the sum of \$88,000.00.

The witness further identified Government's Exhibits 88 and 89, the same being the letters referred to in the indictment in Counts 3 and 4, and testified that he had received the same in the ordinary course of mail at or about the time the same were dated.

The United States offered into evidence, after identification by Archbishop Beckman, Government's Exhibit 90, a letter which reads as follows:

Archbishops Chancer
Cor. Eleventh and Bluff Streets,
Dubuque, Iowa

November 14, 1936.

Dear Archbishop:

I came to Dubuque today but missed you.

To put it in a few words tell you the object of my visit, I am the [67] owner of the property in which Mr. Hogan and I am now in Chicago purchasing machinery at this time. Needless to say I am in need of money to pay down on the machinery and I would like to have

(Testimony of Archbishop Francis J. Beckman.)

something definite at this time as I have other offers for my property I would like to interview you before I accept any other offer. I feel that I can give you information on the project that others cannot give you. I would therefore like to see you at the earliest possible time. I will gladly come to Dubuque or to any other place where you can arrange to meet me. Kindly address your notice of appointment by wire or telephone collect to the Stephens Hotel, Chicago.

Sincerely yours,

PHILLIP SUETTER.

Government's Exhibit 91, a letter which reads as follows:

November 14, 1936.

Dear Archbishop Beckman:

I came to Dubuque today in the hope of seeing you but I missed you.

I am anxious to speak to you about the project Mr. Hogan has taken up with you. I feel that if I can have a personal interview with you that I can give you information on the matter which others are not in a position to give.

I am in Chicago at the present time purchasing machinery to get operations under way and of course I could use money to apply on the purchase of said machinery.

I have offers for the property but I do not

(Testimony of Archbishop Francis J. Beckman.)

wish to accept them until I have an opportunity to talk to you.

I will meet you at any place you designate and will gladly go into the matter thoroughly with you.

I am staying at the Stephens Hotel, Chicago and would appreciate it if you would wire or telephone me collect and name a place where we can meet.

My object is to have a definite answer either one way or the other. My object is not so much to get money from you I have to know whether or not you wish to go into the project, more extensively. I feel that I can explain how you can get quick returns on this personal investment.

Sincerely yours,

PHILLIP SUETTER.

Government's Exhibit 92, a letter which reads as follows:

Portland, Oregon,

May 20, 1938.

Most Reverent Francis J. Beckman:
Dubuque, Iowa.

Dear Arch Bishop:

I was down to the Electric Steel Foundry looking over the dredge. It is surely a mammoth outfit. They are using the best material and, after [68] looking at the whole set up, you would wonder how they could ever move that

(Testimony of Archbishop Francis J. Beckman.)

over these highways with trucks and you would learn why it takes time to get an outfit of this kind together.

While down there I was informed by their road manager, Mr. Holden, about a property I could purchase on account of friction among themselves, that is a "going plant." This last week's cleanup was 162 ounces, which would be close to \$5,000.00. I am leaving here Sunday for Southern Oregon. I am going to the man who has control, as I was advised that the property could be bought for about \$125,000.00; and by conservative figuring there is still \$1,000,000.00 to ship, \$500,000.00 in this property.

I think it would be well for you to give this a good thought and let me come back to Chicago and sell \$125,000.00 worth of these notes in three weeks or less. You could take this money out of the property within ten months or less and you would still have five to six year's work on this property with the outfit that is working there now. This is another sample of a board of directors causing friction, as I get it. Now, your Grace, give this a good thought. It will be quick money right now.

I hope to hear from you at once what your thought will be on this. If it interests you, I am positive you could send anyone you wished out here, or come yourself. It is one of the best propositions I have ever seen and should not be passed up at the amount it can be purchased

(Testimony of Archbishop Francis J. Beckman.)

at, and by signing one of those agreements which those people in Chicago, wanted, I can sell that many notes within ten days.

Very respectfully,

PHILLIP SUETTER.

P.S. There is nothing in the country like our other property for value, and we will have one of the best dredges in the country when I have finished. I am putting all the pressure on them that I dare, and everything is fine and everybody is happy. I will give you more information after I have looked at the property. It is mighty big thing.

Government's Exhibit 93, a telegram from the defendant, Phillip Suetter to the witness, Archbishop Beckman, dated February 29, 1940, which reads as follows:

Western Union

1940 Feb 29 PM 352

C 262 176 DLC 1/100—Portland Org 29 121P

Archbishop Francis Beckman

Bishop P P Rhode has Sued Me Federal Court Here Claiming Thirty Thousand Dollars Notwithstanding Your Certain Undertaking and Definite Promise Page Four Lines Nineteen to Thirty Seven Both Inclusive Our Contract Dated Seventeenth of June Last Signed and Duly Acknowledged by You in Your Archiepiscopal Capacity as Archbishop of Dubuque Roberts Office in Medford Oregon Stopping Consequently You Are Hereby Required and Demand

(Testimony of Archbishop Francis J. Beckman.)

Is Made That You at Once Cause This Rhode Suit to Be Immediately Dismissed and Me [69] Served Harmless and Fully Indemnified From Any of His Claims as of Said Contract Definitely Provides Stop It Also Be Compelled to Make You a Party in the Rhode Suit If It Is Not So Dismissed and Incoude All the Matters and Transactions Between Us Upon Which You Have Defaulted Your Contract So That Your Liabilities to Me Which Have Been Deliverately Neglected Can Be Fully Enforced and Adjudicated Stop Father Kessler Recently Telegraphed Answering My Previous Demand of You for the Settlement of These Matters by This Exigency of the Rhode Litigation Demands Instant Consideration Stop Neither has any Intention Been Given Urgency of Having Tractor and Personal Belongings of Mine to Be Delivered to Me.

PHILLIP SUETTER.

On cross-examination the witness testified that he met the defendant Suetter at the Stevens Hotel in Chicago; that his mining engineer, Daix, stated the properties had not been thoroughly tested; that Phillips of the Link Belt Company favored the property and did not agree with the others that the gold could not be taken from the black sand.

The properties were discussed and it was agreed that further testing was necessary and also the nature of the machinery to be used. Suetter later informed Archbishop Beckman that he was testing

(Testimony of Archbishop Francis J. Beckman.)
the properties and had dug twenty test holes. Beckman testified further that he had received a letter, dated January 14, 1937, (Government's Exhibit 46) signed by Phillips of the Link Belt Company stating that they had made some secret tests of the ore and had recovered \$68.00 per ton. The witness further testified that he had had displayed to him Exhibit 43 which contained some approximate figures as to the value of the properties controlled by Suetter as compiled by the Link Belt Company bearing the signature of Phillips.

Archbishop Beckman testified that he knew generally about mining and that he inquired as to water on the properties. He also testified that Phillips had represented that the properties were a good proposition; that later Suetter informed Beckman that he was dissatisfied with the Link Belt Company and was going to return to their employees some money that they had invested; that Suetter had contemplated [70] purchasing certain equipment from Link Belt Company and that he had informed Beckman that he was dissatisfied with the Link Belt people and would buy his machinery in Milwaukee. Beckman stated that he had never seen any machinery purchased by Suetter. Defendant introduced his Exhibit 94, a group of photographs of mining equipment, and the witness admitted that he had seen some of the equipment and photographs.

Archbishop Beckman testified further that he issued the notes first as his personal obligation to

(Testimony of Archbishop Francis J. Beckman.)

be sold to friends only; that he had never dealt with brokers; that he had authorized Suetter to add the words "Archdiocese of Dubuque" to the notes; and that immediately thereafter he countermanded that authority upon advice of counsel.

Archbishop Beckman further identified Defendant's Exhibit 95, a letter to Suetter from Beckman dated April 14, 1938, reading as follows:

"Dear Mr. Suetter: I am enclosing check on First National Bank of Chicgao for \$10.-000 which I deposited in that bank with check from Bishop Rhode of Green Bay. I haven't yet made much progress here—hope to report better tomorrow when I see Father Kessler. Do not hope for much from the Chancery. Will try everything else first. Will try to raise \$10.-000 here. Hope you can raise the rest elsewhere. My check will reach the First Nat. Bank Saturday, so will date it Monday to make sure. I hope you are making progress there and striking better customers. There is no hope from the brokers. All are same, all demand same. Regards to Father O'Laughlin. Wishing you the grace and consolation of this Holy Week, I remain, Yours very sincerely, Francis J. Beckman."

On further cross-examination, Archbishop Beckman identified Defendant's Exhibit 96, being a letter to the Indiana Securities Commission which reads as follows:

(Testimony of Archbishop Francis J. Beckman.)

“The Midwest Antiquarian Association, Columbia Museum, History, Art, Science, Columbia College, Dubuque, Iowa, open to the public. Sec. Treas.: Rev. A. G. Kessler, Curator

Dubuque, Iowa, September 3, 1938; To Indiana Sec. Comm.

“This is to certify that the Most Reverend Francis J. L. Beckman, Archbishop of Dubuque, Iowa, in the unrestricted Chairman of the Board of Directors of the Midwest Antiquarian Assoc., a corporation in the State of Iowa founded for the purpose of furthering Columbia Museum. The Art collection of Columbia Museum is valued by experts at \$1,500,000. The insurance coverage on the principal works is \$200,000. He has also many valuable works of Art in his home. A conservative estimated of the [71] value of these pieces of his personal property is \$35,000.

“This is a low estimate of these articles. Any notes issued by him are protected by the articles in his home alone aside from the Museum and the diocean properties under his control.

“The diocean properties are worth several millions of dollars. Rents accruing monthly amount to over \$4,000. Donations and interests bring this monthly income considerably higher. As Archbishop of Dubuque these properties and funds are under his immediate direction and control.”

“A. G. KESSLER, Curator”

(Testimony of Archbishop Francis J. Beckman.)

Archbishop Beckman further testified as examination follows:

Q. That is all with that. Now you stated that you became concerned from time to time. Archbishop, about not having anything in writing from Mr. Suetter and having advanced to him certain moneys to buy equipment, and you stated that you felt that something might happen, or anything might happen, to Mr. Suetter and therefore you wanted something in writing from him, and as a result thereof an agreement was provided, at your request, by Mr. Suetter, which is Government's Exhibit 79, the "Terms of agreement re Suetter Placer Mines located in Josephine County, Oregon"?

A. Yes.

Q. That is correct?

A. Yes.

Q. And that was dated March 26th of 1938?

A. Uh huh.

Q. When you knew at that time that Father Bubacz, and Bishop Rhode, and Ralph Montag, were also involved?

A. Yes.

Q. So you knew about Ralph Montag then on March 26th of 1938?

A. Yes.

Q. What did you know about Ralph Montag?

A. All I knew was that he had an interest in the mine, but Mr. Suetter told me that his in-

(Testimony of Archbishop Francis J. Beckman.)

terest and his share was to come out of Mr. Suetter's and never affect mine. [72]

Q. You stated another purpose of having Suetter draw an agreement was that you wanted control, feeling you had put up the money that you wanted control of the properties?

A. Of what I put in; not of all of the properties.

Q. Can you explain that? You wanted control of what?

A. Between him and myself. I wanted it in case he would die, that I would have something to show for it.

Q. What did you mean by control?

A. Control of my own investment.

A. And how would you have control of your own investment?

A. By a suitable document. But I have put in by far, the most money. The others had put in only a very small amount.

Beckman testified that he was not satisfied with the agreement referring to Exhibit 79, and that he was later, on May 14, 1938, supplied with another, being Exhibit 82; that he, after learning of Montag's interest, continued to invest in the properties; that the accounting contained in Exhibit 82 showed \$253,750.00 worth of the Archbishop's diocese notes issued, about half of which were outstanding; that he had invested \$40,000.00 more in cash with Suetter after that date.

(Testimony of Archbishop Francis J. Beckman.)

He further testified that he had visited the properties three times, first in February, 1939, the next early in May, 1939, and the third time at the end of May, 1939, when final settlement with Suetter was made. Beckman stated that he knew the defendant was "bungling" but that he believed in his honesty, and that he had a legitimate enterprise. He identified Defendant's Exhibit 97, as a letter written by Archbishop Beckman to Suetter after his first visit in February, 1939, which reads as follows:

"Dear Mr. Suetter: I want to tell you again how much I enjoyed my visit and how well pleased I am with all I found. You have done wonders! I understand all better now. I hope to raise the necessary fund soon as I get home. Will try every source. Get the Rubens going first—get the richer ore through to get money for others. Send me some of the black sands—keep me posted on cleanups. Don't forget to take your rest—keep your health—and don't drive too fast! We must not tempt providence! Will send for pictures and literature. Again many thanks and regards."

In reply to the inquiry on this Exhibit the witness testified: [73]

Q. And you stated that you found everything satisfactory there, that you understood everything better, and you were well pleased with what he had done? A. True.

Q. Was that a correct statement?

A. True.

(Testimony of Archbishop Francis J. Beckman.)

Q. And that you were going to raise funds, was that in regard to a mill for the——

A. That was for the——

Q. The Wheeler property?

A. The so-called Wheeler property.

Q. That was also known as the Reubens property?

A. I don't remember the name.

Q. What did you refer to when you said "Get Reubens going first"?

A. I suppose that was it.

Q. Yes. And you had examined these properties in person?

A. Everything was going—when I got there everything was going full blast and it looked awful good to me.

There was also introduced into evidence Defendant's Exhibit 98, a letter from the witness, Archbishop Beckman, to the defendant Suetter, dated May 14, 1939, whose material parts are as follows:

"Phil, I am sorry to have to urge you to do so, but I must have things organized and safeguarded under all circumstances in order to make a report to Rome. That is like making a report to our Lord Himself. That is why I so insist a partnership is dangerous because we become personally liable for one another. The present arrangement is uncertain. A corporation is the best. I will be the corporation. I will take only 10% for myself to dispose of for

(Testimony of Archbishop Francis J. Beckman.)

religion, for the Pope for the missions and 70% of the John Bosco for seminary, college, Museum, Charity Bureau, Home Mission Fund, Widow and Orphans, each of these a corporation of which I am the president and which I control so I am in control alone, you 10%. I will never let you down. I trusted you with all of my reputation, same as my life. I love you as a brother. I could cry when I see you hurt. I suffered when I scolded.

“I asked for the notes because I fear to have them out. I will finance it otherwise and will raise enough money at 4%. I durst not have the notes with the Archdiocese of Dubuque on it. They must be my personal obligation with my museum to back them up. So don't fear O'Laughlin. He represents me while I am away. Forget your peeves; don't be babyish. We are men, Catholics, and for the sake of St. John Bosco, of Catherine [74] Tekakwitha, do I ask. We want to avoid any scandal. After all, I put up the money and I should have control of the properties and have the say and dictate the terms. I will protect you.”

In reference to the foregoing exhibit the witness testified:

Q. That was the second time, Archbishop, you mentioned you should have control of these properties? A. Yes.

(Testimony of Archbishop Francis J. Beckman.)

Q. And you suggested the formation of corporations for each individual property, in which Suetter was to have 10%? A. Yes.

Q. You finally did obtain from Suetter, approximately at that time, an agreement whereby you acquired 60% of the properties.

A. Yes.

* * * * *

Q. So, as I understand it, Archbishop Beckman, after the 11th day of February, 1939, there was a new understanding about these properties and you were the owner of 60% of the property described in this agreement?

A. I was.

Q. In other words, "Whereas, the Party of the First Part," which is Francis Joseph Beckman, "has and is still financing the party of the Second Part in acquiring and developing mines known as: St. John Bosco, also known as the French Hill Mines, in Del Norte County, California; the Norton Mines in Josephine County, Oregon; and the California Mine, also known as the Reubens Mine, on Graves Creek, Josephine County, Oregon.

"Now Therefore, it is hereby agreed between said parties that ownership of said mines shall be held on a basis of 60% to the party of the First Part." Now as a matter of fact, in referring to Gov't's Exhibit 83 and the \$40,000.00 that you speak of, Archbishop, I have here these

(Testimony of Archbishop Francis J. Beckman.)

checks, Govt's Exhibit 83, and I find a check dated February 11, 1939, the date of the execution of this agreement, for [75] \$1,000.00; check dated March 4th—these checks were all after the agreement? A. Yes.

Q. March 4, 1939, \$503.00; March 4, 1939, \$10,000.00; March 4, 1939, \$2,006.00; March 5, 1939, \$7,500.00; March 20, 1939, \$3,000.00; April 18, nineteen—that is 1938. So that approximately I think just roughly here it figures around \$24,000.00 that was advanced after this agreement was entered into in which you became the controlling owner of these properties?

A. Yes.

Q. Now as I understand it from Govt's Exhibit 87, you also issued some notes dated 1939?

A. Yes.

Q. Approximately how much in notes?

A. I think twenty thousand.

Q. Twenty Thousand dollars?

A. Yes.

Archbishop Beckman testified that he had received reports from his representative and agent, Monsignor O'Laughlin, from time to time; that Monsignor O'Laughlin was looking over the properties for the Archbishop; that Monsignor O'Laughlin was sent to the properties shortly after Suetter and the Archbishop had completed their original negotiations for financing the operation; that Monsignor O'Laughlin was appointed as the witness's agent and attorney in fact.

(Testimony of Archbishop Francis J. Beckman.)

Beckman testified that suit was filed in Josephine County, Oregon, on June 1, 1939; that the defendant Suetter was enjoined thereby from operating any of the properties; that on the 17th day of June, 1939, a settlement agreement was entered into whereby the defendant Suetter, returned to Archbishop Beckman the notes in the amount of \$171,250.00 and deeded all of the mining properties except the original Suetter (Josephine) Mine; that Beckman agreed to pay Suetter the sum of \$20,000.00 cash and to assume the claims of Bishop Rhode and Father Bubacz for any interest or any investment in the properties that they had made.

[76]

On re-direct examination the witness, Archbishop Beckman, testified that he had received the machinery and equipment from the defendant Suetter and that title was clear to all of the equipment so turned over to him.

The U. S. thereupon called

MR. ROBERT H. STRONG

who testified that he knew the defendant, Phillip Suetter; that he was acquainted with the Norton Mines or Josephine Mines in Josephine County, Oregon; that he had taken an option on said mines for a group of Eastern clients; that he had prepared the factual survey, defendant's exhibit 20, for said clients; that he was not, and did not pur-

(Testimony of Robert H. Strong.)

port to be a mining engineer; that said survey did not purport to be an engineers report; that it did contain certain maps and assayers reports as to the values found on the property; that it was intended to be used by, and examined by persons conversant with mines and mining; that it was not intended to be used as a basis for the sale of the mines or stock therein by the general public; that the option he held on behalf of his, Strong's, clients had not been exercised; that Strong knew that Ralph T. Montag had an interest in the property.

[77]

I. R. PERRY

was produced as a witness for the United States and testified that he was traffic manager and accountant for the Medford-Crescent City Truck Lines; that he had been employed by the defendant, Phillip Suetter, part time in March of 1939 until December, 1939; that he was originally employed to make an accounting to be submitted to Archbishop Beckman; that the accounting was never completed but that a preliminary trial balance was made "as of April 30, 1939"; that said trial balance covered the Suetter Placer Mines and Phillip Suetter.

The witness identified Government's Exhibit 104,

(Testimony of I. R. Perry.)

a copy of the trial balance, prepared for Mr. Suetter which reads as follows:

EXHIBIT No. 104

	"Debits	Credits
First National Bank of Portland, M. Branch.....	\$ 12,000.00	
First National Bank of Portland, G. P. Branch.....	14.28	
Bank of America, Crescent City, Calif.	301.81	
First National Bank, Crown Point, Ind.		4,532.40
American Trust & Savings Bank, Dubuque, Iowa	5,000.00	
First National Bank, Chicago, Ill.	7,000.00	
The Commercial Bank, Crown Point, Ind.		15,474.84
Anna Suetter	2,250.00	
Phillip Suetter	40,955.65	
J. V. Burke	15,013.00*	
P. L. McLeod	6,649.81*	
Josephine Knighton	2,976.00*	
E. J. Bickford	6,526.93**	
Bill Merrith	100.00*	
F. J. Beckman	13,000.00*	
Geo. Sutherland	50.00*	
P. J. O'Laughlin	500.00*	
Machinery	107,142.71*	
Office Equipment	57.50*	
Cars and Trucks	7,565.86*	
Buildings and Camp Equipment	3,799.59*	
Mineral Claims	6,072.57*	
Development	1,898.90*	
Investment Account		281,636.90
Labor	26,007.66*	
Fuel for Power	5,498.49*	
Car and Truck Expense.....	3,368.54*	

(Testimony of I. R. Perry.)

	Debits	Credits
Groceries and Camp Supplies	4,172.91*	
Repairs and Mine Supplies..	5,526.33*	
Workman's Compensation Insurance	1,695.58*	
Social Security Taxes	1,375.07*	
Telephone	653.19*	
Legal Expenses	1,680.95*	
Interest Paid	1,735.63*	
Traveling Expenses	1,221.37*	
Commissions Paid	6,430.00*	
Misc. Expense Including Insurance	3,289.89*	
Royalties Paid	113.92*	
	<hr/>	<hr/>
	\$301,644.14	\$301,644.14
		[78]

“The total expenditures marked by * amount to \$234,122.40. All these items are supported by cancelled checks and most of them also by paid invoices. The item marked **, which is included in this total, has a charge of even \$6,000.00 in it which is not supported in the records I have by a cancelled check but shows to have been paid by the bank and a memorandum with the bank statement that it is for the Bickford Property. This item is doubtful as there is also a disbursement shown by J. V. Burke to the extent of \$6,000.00 for the Bickford Property. Deducting the \$6,000.00 would leave \$228,122.40 properly supported by cancelled checks. No cash payments made by Suetter from cash drawn out of the banks has been credited to his account and charged to expense in these figures. These will in due

(Testimony of I. R. Perry.)

time be checked and credited to Mr. Suetter's account and charged to the proper expense account.

"It will be noted that five bank accounts show a balance still on hand in the banks and two show large overdrafts. These entries to these accounts were made from data furnished, deposits being taken from the bank statements themselves and credits being entered from cancelled checks available. No cancelled checks were furnished on either the Chicago or Du-buque Banks and no statement furnished on either of the Crown Point Banks, although some cancelled checks were found in the files and entered.

"All cancelled checks and bank statements through April 30th, 1939 are entered in the books, but a check of all invoices on hand will have to be made to determine what checks are supported by invoices, time cards, payroll records, etc., and also to eliminate certain hotel bills, etc., which were paid by check in order to determine what bills were paid in cash and the amount to be credited to the Suetter personal account and charged to the proper expense account.

"It would be well to determine from the complaint and suit filed by Archbishop Beckman and from Attorney Roberts the exact data necessary to go into court with as it is possible that some of the data we have may not be neces-

(Testimony of I. R. Perry.)

sary and also possible that supporting invoices may have to be obtained from various vendors to support the cancelled checks on hand.

“Certainly a thorough search should be made for all the supporting invoices covering expenditures on the St. John Bosco Mine, which were bound and taken to Crescent City about thirty days ago.

“The gross amount of the Notes signed by Archbishop Beckman in favor of Phillip Suetter should be furnished me and any data available to show the discount and commissions paid on notes disposed of and a list of the notes still on hand that have not been sold. These figures are necessary to determine the total amount of money to be accounted for. Also is there any money furnished direct through checks or cash by Beckman other than through the medium of notes?

I. R. PERRY.

August 1, 1941”

Perry testified that said trial balance was made from cancelled checks, original invoices, letters and other information given by the defendant, Suetter; that it was a correct summary of the material supplied.

The witness further testified upon direct examination as follows:

Mr. Dillard: Q. “Investment account \$281,636.90. Do you recall the item?”

(Testimony of I. R. Perry.)

A. "The two hundred eighty-one thousand and investment account is nothing more or less than the deposits which were charged to the [79] bank and credited to Mr. Suetter's investment account. You might say it is a balancing account for all your other figures, yes."

Q. "Did you say it came from deposits?"

A. "Yes. In other words, you, take, there was \$10,000.00 put in the bank, it would be charged to your bank account and it would be a credit to Mr. Suetter's investment account unless I had some other source, or knew, or knew the source it came from. I say some other source; say machinery or something."

Q. "May I ask this: Supposing Mr. Perry—I am just seeing if I can understand your balance and the way you made it up—supposing I had put in \$50,000.00 in the Suetter Placer Mines in 1938, would that \$50,000.00 be in this \$281,000.00 figure that you have got there?"

A. "It would unless the record showed directly that it had come from you, but if the fifty thousand had gone in there and I didn't know definitely it came from you, it would go to Mr. Suetter's investment account. If I knew definitely it came from you, it would be shown as a liability of Suetter's.

Q. "I see. That is all I wanted to get at. I note a credit item of \$15,474.84 up here under credits; that is under the name of the Commer-

(Testimony of I. R. Perry.)

cial Bank, Crown Point, Indiana. What was that item?"

A. "Well that—I had that amount of cancelled checks on that bank. I was never able to find the bank statements or any indication there had been that much money put in the bank. Apparently there had been, though, because they had honored the checks."

Q. "Now then, you have got an item here, Anna Suetter \$2,250.00 under debits. What did that mean?"

A. "That is the checks Mr. Suetter had written out to Mrs. Suetter. The total of those varies at various times."

Q. "You have got an item here Phillip Suetter, \$40,955.65." [80]

A. "That is the total of checks written out to cash which were not identified as to any particular expense account, or written out to Mr. Suetter himself; in other words personal withdrawals from the bank."

Q. "You have an item here of machinery \$107,142.71, under the column debits. What does that mean?"

A. "That is the total amount that had been spent for machinery."

Q. "Did you take into consideration or have any information about, at the time you made this trial balance, money put into the venture by Ralph Montag of Portland, Oregon?"

A. "Well, I knew from Mr. Suetter's con-

(Testimony of I. R. Perry.)

versation that Mr. Montag put in some money; how much or anything I don't have any idea, and it wasn't taken into specific consideration in making the accounting."

Q. "Is there any item here covering the Montag money?"

A. "Not that I can identify."

Q. "Did you have an item in this account of cash received for the sale of a gold washer or gold dredge during the month of April, 1939?"

A. "No, I don't think that that was taken into account there. At least, it wasn't directly as an item to be identified anyway."

On cross-examination the witness testified as follows:

Mr. Prendergast: Q. "Now, counsel has asked you in regard 'labor, \$26007.66.' Over what period of time does that cover, Mr. Perry, do you know?"

A. "Frankly, I just couldn't tell you exactly what period of time that does cover."

Q. "That is entered as a debit?"

A. "I think it was over a period of, starting in early 1937, I believe, up to that date. Now, I would not be certain."

Q. "1937 to 1939?"

A. "Yes, approximately that, I would say."

Q. "That is on the Suetter Placer Mine?"

A. "Well, that covers the Suetter Placer Mines, which include all [81] operations. It

(Testimony of I. R. Perry.)

included the Josephine, a portion of the California mine, and I think there is possibly some of the St. John Bosco in it."

At the close of the case for the United States, defendant, through his counsel, moved the Court for an order dismissing the cause against the defendant on the ground and for the reason that the United States had failed to prove any fraudulent scheme and had failed to sustain its case, which motion was then and there denied by the Court, to which ruling the defendant, by his counsel, then and there excepted.

The defendant,

PHILLIP SUETTER,

was thereupon called as a witness in his own behalf and testified on direct examination that he had sent the letters and had used the other means of interstate communication as charged in the indictment; that he had met the persons charged in the indictment as having been defrauded substantially as proved by the United States; and denied any scheme, artifice or intent to defraud in any of the transactions.

He further testified that prior to 1927 he was engaged in the business of trading horses and livestock; that he became interested in mining in 1927; that he had lost everything in the depression and had gone through bankruptcy in 1933 following which he went to Southern Oregon; that he had

(Testimony of Phillip Suetter.)

acquired an option on the Josephine properties in June, 1934.

The defendant, Suetter further identified Defendant's Exhibit 105, a cost sheet on the "Mt. Reubens" or "Wheeler" mine as follows:

"COST OF MT. RUEBEN MINE AND EQUIPMENT"

"7 Claims on top of Mt.....	\$ 25,000.00
"2 Claims on Rueben Creek tunnelling site, water rights etc.	\$ 11,000.00
"Prospecting & engineering, surveying, assay- ing etc.	\$ 7,000.00
"Road building from Leland to mine.....	\$ 6,000.00
"Work on California tunnel and Reed tunnel..	\$ 1,200.00
"Main tunnel Equipment, rails, ties, tanks, pipes, etc.	\$ 20,000.00
"Power plant from ditch to tunnel, including all mach.	\$ 25,000.00
"Camp buildings and equipment.....	\$ 45,000.00
"Saw Mill. All gone by Turbine.....	\$ 4,000.00
"Small tool and Implements	\$ 1,500.00
"Building Flumes on Ditch. Repairing, Level- ing & Cleaning.....	\$ 8,500.00
"Main Water flume, Intake & Penstock. Esti- mated cost	\$ 75,000.00
"Main tunnel construction & drifts. About 10,000 ft.	\$225,000.00
<hr/>	
Total	\$443,700.00

[82]

Began work on road from Leland to mine in 1919. Closed down all work when Engineer died in 1929."

(Testimony of Phillip Suetter.)

EXHIBIT 159

Kerby, Oregon

November 7, 1938

“Assay made by O. E. Walling on 1# in lb. of Black Sand. Gold 1500 grain at \$.16 per grain \$90.00 per ton [82-A] Platinum and osmeridium group undetermined.

Signed by O. E. WALLING,
Kerby, Oregon.

Monday November 7, 1938.”

The defendant further identified Defendant's Exhibit 108, a letter dated April 22, 1939, from Archbishop Francis J. Beckman to the defendant, Suetter, as follows:

“Catholic Students Mission Crusade
Crusade Castle
Shattuc Ave. Linwood
Cincinnati, Ohio

My dear Mr. Suetter:

“Your letter was forwarded to me here. I am sorry if I hurt you because I did not intend to. But you can understand that I am getting more and more anxious. Always giving out money & never getting returns. I know it takes time—I have trusted you and do trust you. With everything, but I must have security in writing. In case anything happens to you or to me—the diocese must be secured. I must do this in conscience—I must make my report to Rome this year make it to the Pope the Vicar of

(Testimony of Phillip Suetter.)

Christ—same as making it to our Lord Jesus Christ himself. It must be honest, exact & safeguard His Church. If anything should happen to me, and I left things as they are now without written security it would be a scandal. If anything happened to you, and I would not have the 60-40 contract on all there would be a worse scandal. That is why I must insist on all this in writing.

“If I could be sure you would live to finish all—I wouldn’t worry, but you can’t be sure & the Church must be secured.

“Besides whatever you got you got with my money. How could you think of keeping the Ajax & Slate property out of the contract when it was my money got it all? Then too you promised me for two years to give an account of every cent I gave you—every note and every cent spent & what for it was spent. You have never done that. Don’t think I would ever interfere with you. All I want is security on paper. You always say you care for very little for yourself yet you want more than half & keep controll—where all was gotten with my money. So you see I must act in conscience. You can trust Father Kessler absolutely. He raised most of the money for you, he too in conscience must safeguard the Arch Diocese. So please understand. I know you would do anything for me. I know you would not harm

(Testimony of Phillip Suetter.)

me—I trust you. I loved you from the beginning & always will, but I must secure the Church.

“So please sign up for Father Kessler. I wired him to stay till he got everything fixed up, so I and the diocese, and Church are secure.

“I sent you some Palms—don’t worry! Don’t bother [83] about anybody else. You & I are together—but I want to be made sure on paper. Now God bless and keep you! Write again. Tell me prospects.

“Can you send me some money to meet interest and debts—? I can make it good again later! I need it now. Pray for me as I do for you & under & with God do as I said & we can expect for blessing.

“Regards to all—yours very sincerely

FRANCIS BECKMAN

Archbishop, Dubuque

April 22, 1939”

On cross-examination the defendant, Phillip Suetter, testified that he had met Ed Hogan in Grants Pass, Oregon; that Hogan had informed him that he, Hogan, could raise the necessary money to put a dredge on the Josephine Mines, or Norton property from connections he had in the East; that Suetter agreed to allow Hogan 20% commission on the money so raised and a 5% interest in the mine if he were successful; that he, Suetter, supplied Hogan with an automobile and expense money; that

(Testimony of Phillip Suetter.)

he did not hear from Hogan for two or three months after Hogan had gone East; that he did not know of Hogan's exact whereabouts but that the latter received his mail general delivery.

Suetter further testified that seven or eight months after Hogan had left Grants Pass Suetter went to Chicago to locate him; that it was 30 days before he contacted Hogan; that Suetter learned that Hogan had misrepresented the mines to Father Bubacz and that he gave Bubacz some "Units" in the mine upon learning of the misrepresentations so made; that his purpose in going East was to retake the car and see that Hogan did not put over any deal that Suetter did not approve of.

After identification by the witness, Suetter, the United States offered in evidence Government's Exhibits 112 and 113, as follows:

"The Stephens

Chicago

Oct. 22, 1936

Ralph Montag

Dear Friend

"When arriving back to Chicago your letter of the 19th here. [84] I mailed your letter special Sunday the 11th got check on 10th Saturday afternoon. Hotel would not cash it limit is \$250.00 Sunday then Monday holiday then Tuesday morning cancelled trip that is that. Mr. Gilmore went to Oklahoma on 10th Satur-

(Testimony of Phillip Suetter.)

day 1:30. I got wire he wanted blueprint of machine. He got that fixed my wife she sent map. This is separate deal from Hogan deal intirely because I wrote you special Sunday 11th and explained first come first served. That is that. Now then Monday 19th I told Hogan what had to be done. I took the car went to Cincinnati and Covington to raise 2 or 3 thousand for expense money to put these deals over but my man had left for Florida so I wired you for money for \$250.00 then I changed my mind and called Hogan up at Chicago. He said he talked to Bishop but haven't seen him yet to find just what was said but I am positive that deal is made. This time I am not bound to any one. I called Gilmore at Okla. City. He told me what had took place so I went to Cincinnati which is just acrossed river but I haven't been there for thirty years. I put in biggest part of day looking up few people to get this said expense money I mean just borrow it. I made up my mind to long so instead of driving to Iowa after Hogan called I came hear to Chicago Wednesday nite and found your letter and wire from Mr. Gilmore. Now Ralph I can't understand why you did not get letter. I am investigating it further. You got nothing to worry about but sure is hard to put over half million dollar deal on shoe string. I have money you sent me I mailed back to Camp in order to keep things going. If you would of got that

(Testimony of Phillip Suetter.)

letter would told all what I am doing. I sure am not kidding myself on this either. As soon as Gilmore comes back I will wire you and soon I see Hogan this morning I will find what took place on phone. I will wire you this afternoon. So I wired you just as soon as I read your letter and Gilmore's wire soon as I see them I will give you details. 5 ton truck would not hold mining money that is available if I had that property in shape to take just people ride in plane take them out if I had that like I wanted before I left and this dredge will well do work. Link belt are taking out \$12,500.00 twelve thousand and five hundred a day in Virginia City with same outfit second time property been worked and further I am not selling any stock it's on unit plan. Again will say there is nothing to worry about, and there be no strings on any deal. Hogan deal all moneys must clear Portland Banks, and I want to place order for machine before leaving Chicago and buy Keystone drill that is first thing. Don't fail on that two fifty. In any time you want to know anything wire or write Stevens.

Yours Truly,

PHILLIP SUETTER

“With help of God I hope you understand I want you to understand I am not putting on any parties further what you sent me after I get few dollars to camp nothing left.”

(Testimony of Phillip Suetter.)

EXHIBIT 113

“The Stephens

Chicago

Sept. 27, 1936 [85]

“Mr. R. T. Montag
2011 North Columbia Blvd.
Portland, Oregon

Dear Friend:

“I will try and answer your letter, which seems to be a very hard thing for me to do. I thought I had made everything clear to you.

“For your convenience, I am quoting your second paragraph of your letter of Sept. 25th, and my answer will appear directly below it:

“You state that you have a deal on contract signed by the Bishop but you did not tell me the terms of this agreement. Please write me airmail at once telling me just what the deal is. When is he to make his first payment and how much it is to be, also what is the total amount that he is to raise and what is he to get for it. How much is the total money to be raised by him and yourself and Hogan and how much is the money to be applied:

“My answer to the above paragraph is:

There is no contract signed by the Bishop, but there is a letter written to E.E.H. signed by the Bishop. There is no agreement—there is no specified time when the first payment is

(Testimony of Phillip Suetter.)

to be made. The amount may be \$25,000.00 and it may be \$100,000.00. The total amount is \$329,000.00 for 49% of the property's output. The money is to be applied to equip the mine, pay Ralph Montag and Phillip Suetter for what we have put in it. Then operate with the equipment as per blue print, which I put in all day Thursday and Friday discussing about motors with the Link Belt and Fairbanks Morse. I have a man who understands motors. All moneys clears through the Bank of Portland.

“Your next paragraph reads:

“In the first part of this letter you state that he has turned in a large amount of securities to be sold also he has several hundred thousand dollars of oil-paintings which are being sold. Who did he turn these securities over to be sold and if the oil-paintings are sold who has the money. My reason for asking these questions are that in the last part of your letter you state that you do not like to ask him for money and in the first part you state that he has turned in securities and sold oil paintings.

“My answer to the above paragraph is:

“I did not state that he had turned in a large amount of securities to anybody. I told you that they were selling some bonds as per his letter, and that he had a large amount of oil paintings which could be sold. I did not

(Testimony of Phillip Suetter.)

state that they are being sold. His letter said that he could sell them. I shouldn't think you would ask a question of that kind that an Archbishop would turn over these kind of securities to anyone to sell. How would you expect anybody to get the money but the Archbishop. Yes, I said I [86] don't want to ask for any money, or I don't want E.H. to ask for any money, because all moneys have to be cleared through the Bank of Portland as I stated in the above paragraph. Why should I ask you for any money if I was drawing any money here? What I want to get over to you is that all money clears through the Bank of Portland.

"Your fourth paragraph reads:

"I think it well that I should know the details of the deal not because of my distrust but because of my investment and interest in this matter. I was pleased to learn from your letter that a large part of my investment will be sent to me from the first money you receive and am naturally anxious to know when I will receive it to take care of my own obligations here which are pressing."

"In answer to this I will state:

"I want you to know the details. There is no part of your investment which will be sent to you, but will be turned over to you by me in Portland. Again I will say why should I be writing to you for expense money if I did not

(Testimony of Phillip Suetter.)

need it, or if I was drawing any money here?

“Now this is strictly on a unit basis, but since this flurry came up that I mailed you the paper three Bishops and one or two of the other want to take the whole proposition, and it looks very much that they may turn all of said moneys, or at least \$100,000.00 and since this has come up one of these men has gone to Canada via airplane and flew back who has a interest in said Canada property and he is the main spring in our deal—so don’t let anything else worry you. This is a clean-cut deal without any strings to it whatever.

“This is about as plain as I can get it to you, and I should have \$1000.00 or \$1,500.00 because I don’t get a cent from any one in this part of the country, as I explained above, and don’t delay matters above everything else that you do. The quicker you get this over to me the harder I can push. I want you to know that I had to step on E. H. He got “Nigger rich” on me and I had to tell him how it’s got to be done, but you leave that to me.

“Further referring to your second paragraph: When said money is all paid, Hogan is to have an interest equal with us in this property. After you receive yours, I mine, and the rest equal.

Sincerely yours,

PHILLIP SUETTER

Don’t delay”

(Testimony of Phillip Suetter.)

The witness also testified that he had sought an interview with Archbishop Beckman with a view of interesting him in the mines; that he had several parties interested in financing the mine; that the reference to the "half million dollar deal" contained in Government's Exhibit 112 referred to a deal Hogan had with [87] the Link-Belt Company and a Bishop Gallagher in Detroit; that Hogan had never informed him of any deal with Archbishop Beckman but that said information had come from Father Bubacz.

The United States thereupon, after identification by the witness, offered Government's Exhibit 114, a letter as follows:

"The Stephens
Chicago

Oct. 25, 1936

"Say don't think this any pleasure for me back here anything I enjoy here only gets this deal over

R. T. Montag
2011 N. Columbia Blvd.

Dear Friend:

"Sunday 2 p.m. just came back from Link Belt talking to General Manager and desiding what motor that is type desired. We put in the dredge al/so shovel so I decided that you say you must know what money was collected. None. If there had been I would have written or wired you.

(Testimony of Phillip Suetter.)

“And you say you haven’t any more information than you had three weeks ago. They sent some paintings to PA some to Florida was last report that was when I got back I instructed Hogan we don’t want to take it in little dabs. I received your \$150.00 and then I borrowed \$1,000.00 and I did not give any *unites* or security of any kind. Whatever you send me you can just gamble I am not putting on any party. Send me five hundred if I take on just one that may be any minute or day. I will not have spent it foolish. Did not have to friend that I hadn’t seen in 35 years just met him *hear* in hotel told him what I am doing purchasing machinery and he heard me growling about you just sending me \$150.00. He just said Phil here is thousand if it will help so I sent Camp two hundred fifty paid \$150.00 I borrowed send Anderson \$110.00. Gilmore returned from Oklahoma. I gave him fifty to go down Indiana on a deal with car. Again I am going to press this on your mind. I am not going to play any penny anti game with anyone back here and told Hogan so I don’t have to with the connections I have made since being here. Had you helped me to equip that property in small way before I left I would have to get 5 ton truck to haul the money out that is available for mineing. Back here I have made connections with that kind of people regardless of deal Hogan has,

(Testimony of Phillip Suetter.)

but now I have just got to set out one that will put \$25 thousand up without going out and I can do that in next few days with God's help and go to Camp fix things up in good shape then wire Gilmore or Hogan to bring them or come back myself. Now for your information last week this same type dredge in fact same model took out \$45,000.00 last week labor expense \$1,998. General *Mangr* of Link Belt just came back from there and it is property that has been hidraulic never could make it pay. I have had two men wanted to go out and they would pay for machinery and put [88] up expense for 4 Percent. Again I will say that you have got nothing to worry about. In your letter of 19th you say you are on the spot. I don't know what kind of a spot you are referring to but I know this much if you knew what money that is available well believe me like you should you are on spot to make lot of money. There is another thing I want to tell you there is man right here in hotel that I can sell 25,000 unit if porperty was like I wanted it before I left tires on those trucks and one screen up and pump hooked up just to show them in a hurry gold is there. I know it is there better than anyone so I got to do next best thing that is to wait

(Testimony of Phillip Suetter.)

out one and get enough to do it so I can place and signed orders for machinery.

Yours truly,

PHILLIP SUETTER

“Ralph I was just ready to put letter in the envelope my phone rang man that I met at Link Belt plant wants to put in \$30,000 and go out but Ralph I am not going to make any blunders. I came back here to put this over and I am going to do it with God’s help I am going to get at least enough to pay for plant and complete drill, tractor in fact everything we need *weather* you help me or not I am not selling any stock will not entertain that kind of proposition at all. Nobody that wants control can deal with me for I got to guard connection may take little longer but I will get the job done. Don’t worry. So I think this is plain. If I had expense money so man would not have to stew and fret his mind work better. So send me check.”

Referring to Government’s Exhibit 114 the witness, Suetter, testified that the “connections” referred to therein was the deal he had with Phillips of the Link-Belt Company; that he was trying to interest capital in the venture; that he severed connections with Hogan in October or November of 1936;

In response to questions regarding his assets at the time of the purchase of the Norton Mines

(Testimony of Phillip Suetter.)

the defendant testified that Ralph T. Montag had put up a considerable part of the money; that he had borrowed from others for part of the financing; that he had made some recovery in gold to meet the expenses of operation; that at the time he Suetter, went east he and Ralph Montag had invested between eighty and ninety thousand dollars in the mines; that when he had first gone to Southern Oregon Suetter had \$6,000.00 of his own money.

Referring to Government's Exhibit 79, the witness, on cross-examination, testified that the statement contained in said document that "I, Phillip Suetter,—own clear title to the following mining premises in Josephine County—" because title in fact was in his name; that Ralph Montag did not [89] want his name listed in connection with said mine; that the money obtained from Archbishop Beckman had gone to equip the property with proper machinery and the purchase and financing of the St. John Boscoe Mine, the Wheeler or Mt. Ruebens property, and the other properties.

In response to certain questions the witness testified as follows:

Mr. Dillard, Q. "Now, Mr. Suetter, there has been a good deal said incidentally about settlement with Archbishop Beckman, settlement with Bishop Rhode. As a matter of fact, your settlement with Bishop Rhode was a long time after your settlement with Archbishop Beckman, wasn't it?"

(Testimony of Phillip Suetter.)

A. "Well, sometime, yes."

Q. "A year or more?"

A. "Well, when I settled with Archbishop Beckman he agreed to settle with Bishop Rhode."

Q. "Yes?"

A. "Before I signed the contract—and others."

Q. "Now, wait a minute. When was the settlement with Rhode, that is, the business settlement?"

A. "In June, 1939."

Q. "Now, you are talking about the settlement with Beckman, aren't you?"

A. "Well, they agreed to settle with Rhode and others, to pay all bills, before I signed it."

Q. "As a matter of fact, it was a year or so later that Bishop Rhode sued you, wasn't it?"

A. "Yes. Well, no, I don't—well, it might have been a year; I don't know."

Q. "Yes. And after that you, by some means, settled that civil suit with him, didn't you?"

A. "Archbishop Beckman settled it. They settled it among themselves." [90]

Q. "Anyway it was settled?"

A. "Yes."

Q. "And, as a matter of fact, after you had some kind of a lawsuit and settlement with Beckman in '39, you still sold to Bishop Rhode

(Testimony of Phillip Suetter.)

some units in the Suetter Placer mine, didn't you?" A. "I did not."

Q. "I want to direct your attention to Government's Exhibit 68, letter dated Green Bay, Wisconsin, July 27, 1939, and addressed to Mr. Phillip Suetter, Grants Pass, Oregon, among other things saying, 'Kindly give yourself the trouble to send me my certificate for three units of the Suetter Placer Mines, two paid by the present check and one by the check of May 8th. last.' "

A. "Well, he agreed on that before we had—before ever I had signed the contract."

Q. "Yes."

A. "On the Suetter Placer Mine."

Q. "Yes. And you took his money and sent the additional units after you took his money, didn't you?"

A. "I took them to Chicago."

Q. "You what?"

A. "I didn't mail them. I took them to Chicago and tried to collect my money on my contract from Archbishop Beckman."

Q. "Well, as a matter of fact, you did sell him the units and take his money for them, didn't you?"

A. "We made the deal before our settlement."

Q. "Answer that. Did you take his money for them after July of 1939?"

(Testimony of Phillip Suetter.)

A. "Well, he sent the check, I suppose, after that; yes."

Q. "You endorsed it Phillip Suetter?"

A. "Yes." [91]

Q. "And cashed it?" A. "Yes."

Q. "On the 9th day of August?"

A. "Yes."

Q. "1939, didn't you?"

A. "Yes."

Q. "Later in that deposition of yours from which I read to the jury in the course of this trial, you said you considered that all of the mines you were mentioning, all of those you mentioned, the Bosco and others, were Suetter Placer Mines?"

A. "Yes, and operated under the same——"

Q. "What?"

A. "The same financial deal, yes."

Q. "Yes. Did you inform Bishop Rhode that one of the principal investors, Archbishop Beckman, had withdrawn, or thought to withdraw, and asked for an accounting of this fund?"

A. "Did I—what was the question?"

Q. "Well, did you inform Bishop Rhode that one of the principal investors, that is, Beckman, had sought to withdraw and asked for an accounting of his funds?"

A. "Yes. I wrote and told him that Archbishop Beckman agreed to settle and give him—take him in with him."

(Testimony of Phillip Suetter.)

Q. "Now, let's see just for a minute about the situation there in 1939 regarding the so-called Suetter Placer Mines. You told us the other day, I think, on direct examination, that in the end, after your deal with Beckman, after his lawsuit, you ended up with just the Josephine Mines; am I right about that?"

A. "Yes."

Q. "And you transferred some interest in the Baer Mine, St. John [92] Boscoe, and many others we have mentioned here, to the Archbishop?"

A. "That is what they wanted."

Q. "You did that?" A. "Yes."

Q. "And where were you operating in July of 1939? What properties were you operating?"

A. "I wasn't operating any at the time, but what I had left was the Josephine Mines. They was the Norton Mines, which they didn't want. They agreed that—that was our settlement."

Q. "You were still taking money from Bishop Rhode on the Suetter Placer Mines, however, weren't you, at that time?"

A. "He agreed before we settled."

The defendant further testified on cross examination, that he had received certain funds from Archbishop Beckman shortly before the bringing and settlement of their civil suit; that he had demanded \$30,000.00 from Archbishop Beckman in his letter of May 29, 1939 (Government's Exhibit

(Testimony of Phillip Suetter.)

89) to finish out the property; that he did not account to the Archbishop for the money received in the sale of the dredge from the St. John Boscoe Mine but spent the money in the operation of the other properties; that Monsignor O'Laughlin was present at the time of said sale.

On further cross-examination the defendant Suetter admitted that the dredge or gold-washing plant which was purchased from Electric Steel Foundry was placed on his mining property in California and was not sent to the Josephine mine. At one point in Phillip Suetter's testimony the Court asked the following question of Suetter: "All these people in the East with whom you had dealt had dealt on the basis of the Josephine Mine and not on the basis of any other mine?", to which question Suetter answered as follows: "Well, your Honor, I know, but then their own representatives was in favor of the Wheeler and that is a good property today. If they had just let me alone and went on [93] developing it——

The Court: You mean, by 'their representatives' you mean Bishop Beckman's representative, Father O'Laughlin? A. Yes.

The Court: Father Rhode didn't have any representatives here?

A. No, no, Bishop Rhode didn't."

On further cross-examination Suetter admitted the sale of the gold-washing plant and his failure to account to Bishop Rhode for the proceeds received in the sale.

(Testimony of Phillip Suetter.)

Suetter also testified that after he had acquired the St. John Bosco Mine in California he found that the man from whom he had purchased it, E. J. Bickford, had misrepresented the title.

At the conclusion of the examination of the defendant, Phillip Suetter, by his own counsel and counsel for the Government, he gave the following testimony in answer to questions by the jurors and by the Court:

“Juror Elizabeth V. Denner: I believe that one of the witnesses has testified they put up money to buy machinery for the Josephine mine, and then he testified that he was down in that mine and to this day there is no machinery on there but a second hand tractor. What become of the money?

A. Well, that was after we settled. That was up to me. That was turned to me in the settlement, that Josephine Mine, which is my own now.

Juror Denner: But originally did you put any machinery on the mine before you acquired the new ones? A. Which mine?

The Court: The Josephine mines. Yes.

A. Yes.

Juror Denner: Then when did you move the equipment from the Josephine Mine?

A. Well we removed some, a good part of the machinery, when I went down to the Wheeler mine.

(Testimony of Phillip Suetter.)

The Court: I see. Does that answer your question?

Juror Denner: Well, to a certain extent. He said to this day there wasn't any machinery on there. [93A]

The Court: I believe that was Mr. Montag. He said he put up money to buy machinery.

Juror Denner: That machinery was removed then?

A. Oh, that machinery is still there, the majority of it is, only some I took down to the Wheeler.

The Court: In other words, the machinery you bought with Montag's money was still at the Josephine Mine?

A. Yes, sir. There is a Marion shovel up there, and the pipe, hydraulic pipe, and the giant is there, all of it.

The Court: And the only machinery you moved is the machinery you bought subsequently with the money you received from the Bishop and the others? A. Yes.

The Court: Does that answer your question?

Juror Denner: Yes.

The Court: You had one.

Juror B. H. Stewart: Yes. Do you have any idea of what the total amount of cleanup was from these mines during this period of time?

A. No, I have not offhand. I have not offhand, no.

(Testimony of Phillip Suetter.)

Juror Alice M. Stewart: Did you spend any of the money that Bishop Rhode sent you on any of the other mines outside of the Josephine Mine?

A. Well, not the last two thousand, I didn't. I bought a tractor from the Reed Tractor people at Klamath Falls and paid fifteen hundred dollars on it and afterwards—and then I built several, what you call a rubble elevator, and I had no more money to go ahead and I let the tractor go back to the Reed Tractor people.

Juror Stewart: He was only interested in the Josephine Mine, wasn't he?

A. That is all.

Juror Stewart: Well then, you say you did spend some of the money he sent you on some of the other mines other than the Josephine property?

A. Well, that was all done—they knew about that.

Juror Stewart: With Bishop Rhode's consent? [93B]

A. Yes, that is it.

Juror Stewart: But still didn't you testify, or didn't he write you that he wasn't interested in any mines only the Josephine, and he didn't want his money spent any place only on the Josephine mine?

A. That was after we had the settlement.

The Court: That was after the money had

(Testimony of Phillip Suetter.)

all been spent, except the last two thousand;
isn't that correct?

A. Yes, that is correct.

The case was thereupon submitted to the jury under proper instructions by the Court and a verdict returned by said jury finding the defendant "Not Guilty" upon Counts One, Two and Five of the Indictment, and "Guilty" upon Counts Three, Four, Six, and Seven of the Indictment, and recommended leniency for the defendant.

Whereupon counsel for the defendant moved the Court for an order granting a New Trial, based upon the following grounds and for the following reasons:

I.

"The verdict of the jury in finding the defendant Guilty on Counts Three, Four, Six, and Seven of the indictment, said Counts charging the defendant with having violated Section 77 (a) (2) of title 15 U.S.C.A. (Securities Act) is inconsistent with their finding the defendant "Not Guilty" of having violated Section 338 of Title 18, U.S.C.A. (Mail Fraud Act).

II.

"The Court erred in admitting the testimony and exhibits offered by the United States, over the objection of the defendant, without compelling the United States to designate or elect as to which count or counts in the indictment such evidence was directed." [94]

Thereafter and on the 12th day of October, 1942, the Court heard the motion of the defendant and the arguments of counsel in support of their "Motion for a New Trial" and the Court then and there reserved its ruling on said motion.

And thereafter, and on the 19th day of October, 1942, the Court made its decision upon said "Motion for a New Trial," as follows:

"The first point that is made in the motion for a new trial is that the defendant was prejudiced by the fact that the Court declined at various stage of the proceedings when requested by the attorney for the defendant, to limit the evidence to particular counts. Counsel have referred to one case in which the Court merely stated that—the Jarvis case—in which the Court merely stated that the Court was right in not limiting the particular testimony as to each count as there had been no request that be done. I do not take that intimation to be that in a case of this character where the underlying facts are the same and where you are charging in eight counts a scheme to defraud by the use of the mail and you are charging in five counts the use of the mail in the sale of a security in conjunction with a scheme to defraud, that the Court is required to indicate as to each piece of testimony the count to which it relates. I think now, and I thought at the time of trial, that the government is entitled in a case like this to have all the evidence go in and leave the application of the various counts to the jury, subject, of course,

to the Court's instructions. I think the instructions of the Court were very elaborate. You gentlemen paid me the compliment of not offering any objections to the instructions as given. As you are aware, they were chiefly my own product, although I incorporated in three or four instances suggestions that had been made on each side. So I must take that as indicating the belief of the counsel for both sides that the charge of the Court to the jury placed before the Court the proper principles of law relating to the offense.

"Having had a good deal of experience in this line of work and with cases of this character in a district where mail fraud prosecutions are more frequent than they are in this part of the country, I took particular pain to instruct the jury specifically as to each of the offenses even at the risk of repeating some instructions which were applicable to both, so I gave a complete set of instructions relating to the offense of violation of Section 77E of Title 15 of the act commonly known as the Security Act of 1933. So I believe the Court's instructions were sufficient to leave to them the application of the evidence to the counts to which they relate.

"The one common element there was in both offenses, which sometimes doesn't exist, namely, the existence of a scheme to defraud. That element was necessary to prove both offenses. In the first case in dealing with the violation of

the postal law, devising a scheme to defraud by the use of the mail, the elements of the offense are the existence of a scheme intended to defraud and the use of the mail. In the second offense we had the sale of a security, and the existence of a scheme to defraud in conjunction with the sale and use of the mail. So the two common elements of [95] the two offenses were the use of the mail and the device or scheme to defraud.

“As to the securities counts, and that was also an added element, that they should be in the sale—that these facts should occur in the sale of a security or attempted sale of a security, which, of course, was not necessary so far as the first, the mail fraud count, was concerned. If the security counts had been drawn under a different section, such as for instance, the section—I misquoted; that Section I quoted was wrong; it is 77A. 77E is the one I am referring to. If the securities counts had been drawn under a different section such as, for instance, Section 77 E of Title 15, which relates to failure merely to register, it might well have been what we would have had to omit strictly the testimony, because if there had been merely a failure to register a security we would merely have had a sale of an unregistered security through the mail and the element of fraud would not have entered into the matter at all. If not, there may be a violation of the Securi-

ties Act through sale or attempted sale of a security by the use of the mail, a security which has not been registered, under the act.

“But I say, in a case of this character where the element of fraud enters into both groups of counts, a law that would require strict application of each piece of evidence to each count or require the government to select, would work to the prejudice of the government.

“In going over the transcript I found—I mean the portions I had because I only had the portions of the testimony of Rhode and the testimony of Beckman; as a matter of fact, two of the most important witnesses of the Government; the only witness, really, in whose testimony there is any element of any fraudulent representations because neither Father Bubacz’s testimony nor Mr. Montag’s testimony or Mr. Phillips’ testimony would contain any element of fraud, and if that had been all that the government had to offer I doubt very much if I should have permitted the case to go to the jury, because every one of those men seemed sold on the idea, and Father Bubacz actually stated he made no—no representations were made by Mr. Suetter and that Suetter merely made good the representations made by Mr. Hogan. As to Mr. Montag and as to Mr. Phillips they both testified they were still sold on the idea and still believed the defendant actually believed that he had a good venture and were willing to trust him even at that time.

“But in going over this testimony I noticed at various states that when that petition was made the Court always asked the Counsel whether the matter was offered as to all counts, as to whether the matter tended to prove the scheme as to all counts, and in most instances, with very few exceptions, that was the answer. So I think that that point is not, as I conceive the law, well taken.

The second point that is made arises from what is claimed to be a contradiction of the verdict of the jury. The contradiction arises from the fact that the defendant was found not guilty on the two counts of mail fraud, Count One and Two, also found not guilty on the Count Five, on the securities count, which was the telegram sent to Bishop Rhode (Father Bubacz). [96]

“There is no question that, technically speaking, the Courts have been very charitable, over the strong objections of some very fine judges, in trying to overlook inconsistencies and contradictions in the verdict of juries. In our circuit we have had quite a number of cases. We have had *Macklin V. United States* 79 Fed. 2d, 756, *Long V. United States* 90 Fed. 2d 482; *Coplin V. United States* 88 Fed. 2d 652; *Mangeri V. United States* 80 Fed. 2d 199. And strong cases from other circuit judges, among the more recent ones *Freeman V. United States* 96 Fed. 2d 13; *Graham V. United States*, perhaps the latest on subject 120 Fed. 2d 543. Of

course, we have had the famous decision of the Supreme Court in *Dunn V. United States* 248 U. S. 390.

“In that case the Court used this language; the opinion was written by Mr. Justice Holmes—the portion of the opinion I want to read is 393; that was a liquor violation and there were counts of maintaining a nuisance and counts of sale, and the defendant was acquitted on the counts which charged him with the unlawful possession and unlawful sale of liquor but was found guilty of maintaining a common nuisance, and the argument was he could not be maintaining a common nuisance if he hadn’t been guilty of possessing or selling liquor on the place, because the only basis for the contention it was a nuisance was the illegal possession and sale of liquor. The Court said “Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.” Citing cases. “If a separate indictment had been presented against the defendant for possession and for the maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded *res adjudicata* on the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As it was said in *Steckler V. U. S.*, 7 Fed. 2d, 59 at page 60, ‘The most that can be said in

such cases is that the verdict shows that either in the acquittal or in the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as more than their assumption of a power which they had no right to exercise and to which they were disposed through unity.'

"In the Mangeri case, which was one of our cases, the opinion was written by Judge Garrecht and concurred in by Judge Haney and Senior Circuit Judge Wilbur—no, I beg pardon; there was a dissent by Judge Wilbur: the language there used has been cited quite often by the Court in later cases. I am citing from page 201; "It is also contended that the verdict of acquittal as to some of the counts is inconsistent with the verdict of guilty on the conspiracy count. This court has said in *Macklin V. U. S.* 97 Fed. 2d 756: 'The verdicts are not inconsistent, but had they been so, that fact, standing alone, would not render the verdict of guilty under the first count invalid. This Court said, in *Bilboa et al V. U. S.* 297 Fed. 125: "It was the duty of the jury to return a verdict upon each count of the indictment, and the fact that it found the defendants not guilty on one count does not render conviction in the other invalid." 'And the second Circuit has said in *Selden V. U. S.* 16 Fed. 2d 197-198: "We have held that when a jury convicts upon one count and acquits [97] upon another the conviction

will stand, though there is no rational way to reconcile the two conflicting conclusions”’.”

“In the Coplin V. U. S., Judge Garrecht again writing the opinion, reviewing the decision of Judge Bowen, Western District of Washington, again refers to the Macklin case and said: “Verdicts on various Counts,” page 661, “of the indictment need not be consistent. This question has been so recently and so fully discussed by this court that voluminous citations of authority is unnecessary, see Macklin V. U. S. 79 Fed. 2d, 756, 758-759” giving the pages I mentioned.

“In a sense there is contradiction between the verdict of the jury on the mail fraud counts and the verdict on the security counts; also between the verdict of the jury in Count Five and the verdict in counts Three and Four; and Six and Seven; because the same scheme to defraud must be shown to exist as to all. We might attempt to rationalize the verdict and find out what is in the mind of the jury, but I don’t think we can, nor do I think it necessary; we can’t say, as we sometimes say, that they may have found there was no mailing, but that wouldn’t help very much because these letters were admitted, all the letters and all the telegrams were admitted, all the letters and all the telegrams were admitted to have been sent by the defendant.

“The finding of mail fraud, however, may affect the consideration of the other counts. Had the jury found the existence of a scheme to

defraud through the mail as charged in the indictment in Counts One and Two there would be an element of continuity because that kind of scheme can be traced to continue through every count of the indictment; but when there is a negative finding on that there can be no continuity beyond the actual date of the sale of the security. When the sale is completed the offense is over; the scheme ends with the sale.

“I think that is elementary law which flows from the very nature of the case. The important thing that gives jurisdiction to the Court is the sale through the mail. Without that the sale would be local and outside the province of the Congress of the United States to regulate. “It is only because the mail is used in the sale of the security which is offered generally to the public in interstate commerce that the Congress steps in. Otherwise the case would be governed by the various state Securities Acts. We have had cases where prosecution was instituted by the government in cases where there was actually a state permit. * * *

“So the mere existence of a scheme to defraud in the sale of stock a means of transportation and communications is used that we came within the purview of the Securities Act of 1933. Section 77A subdivision (a) (Section 77q. (a) (2) under which the five counts in the indictment were drawn, last five, 3 to 7, says it shall be unlawful for any person in the

sale of any securities by the use of any means or instrument of transportation, and so forth, to employ any device, scheme, or artifice to defraud. In other words, this is not only aimed merely at the sale of unregistered stock, it is aimed at the scheme or employment of a scheme or artifice to defraud. In other words, this is not only aimed merely at the sale of unregistered stock, it is aimed [98] at the scheme or employment of a scheme in the sales through the means of an instrument or instruments of communication in interstate commerce. Without a sale of the security through the instrument of interstate commerce the offense is not committed; and the moment the securities are actually sold, that very moment the offense is complete.

“It may well be that in the subsequent relationship of the ownership of the promoters and the stockholders other wrongs may be committed, or violations of law, but it would not be violations of this particular statute. So that the findings of the jury as to that stock, its statements to the effect that there was no continuity in the scheme to defraud beyond the actual sales; and then the counts, as this was not a sale to the—to the people at large although it was a sale in the meaning of the statute—in determining what took place we would have to consider each particular count and the particular transaction that was carried on.

“Now we take up Counts Three and Four, which relate to the sale of securities to Arch-

bishop Beckman. We find that the sales were made in 1936 and 1937; the moneys realized from the promissory notes were realized in 1937 and 1938. It is true that some money was advanced later but it was done after the definite agreements had been reached as to a new relationship, which I would call that of a partnership or joint venture. We find Archbishop Beckman, for instance, testifying that late in '39 he advanced some \$24,000.00 in cash and signed \$20,000.00 in notes, after February of 1939. Well, the contract of February, 1939 definitely fixed a new relationship. In fact, to understand that contract we have to refer to two previous exhibits. First we refer to Government's Exhibit 79, which is the contract signed by Suetter, executed in Illinois, which is dated March 26, 1938. Now in that contract it is recited certain moneys had been advanced. The significant language that is being used shows that the question of sale of units has been actually concluded, that the amount of units that was to be given to the Archbishop was definitely settled, and that what we are talking about from then on so far as money was concerned is the furnishing of money to operate properties for the benefit of the joint venture which included Archbishop Beckman. The first Paragraph recites that Suetter is the owner of certain mining premises located in Josephine County. The second paragraph says "That a considerable portion of the funds for the pur-

chase of the above described Suetter placer mine in Josephine County, State of Oregon, were obtained from the sale of certain promissory notes signed by Francis J. L. Beckman as Archbishop of Dubuque payable to the order of Phillip Suetter at the American Trust and Savings Bank." The third, "That approximately \$95,000.00 have been invested by Phillip Suetter in the Suetter Placer Mines in Josephine County, Oregon from his own estate and from his personal sources of income." Clearly the elements of a joint venture. Fifth, "That complete and detailed financial reports," and so forth, will be transmitted by Phillip Suetter to Archbishop Beckman. Then it is provided the proceeds shall be remitted to Archbishop Beckman, after deducting the cost of labor and actual operating expenses, until all outstanding promissory notes shall be paid. This instrument is to serve as a supplement to the Suetter Placer Mines Trust Agreement and so forth. It is binding upon the heirs of Phillip Suetter.

"So we find the situation arising where the Archbishop as [99] he testified, wanted to know where he stood, requested this agreement, so that from there on it was a joint venture where Beckman had put some of his—the Archbishop put up some of his money and the Archbishop was to be numbered first out of the proceeds.

"Exhibit 82 is a continuation of what was begun earlier in the year—this is signed

May, 1938, signed at Dubuque at the Archbishop's residence and witnessed by his sister—which is his acknowledgement of the receipt of \$253,750.00 worth of promissory notes, contains a statement as to who is holding them, and Suetter also acknowledges the receipt of \$59,000.00 “in cash by the undersigned Phillip Suetter,” over and above the amount of the notes for the same purpose outlined in the first paragraph. Now the purpose outlined in the first paragraph is indicated by this language: “—receipt of the undersigned Phillip Suetter, of notes in the amount of \$253,750.00 from the Most Reverend Francis J. Beckman for which the undersigned Phillip Suetter has given to the said Most Rev. Francis J. Beckman 150 units in the Suetter Placer mines, Kerby, Oregon, and a 49% interest in the John Bosco Placer Mine in Del Norte County, California.” “For which he was given,” in other words, this was a receipt for the money in exchange for the sales which had already been completed both of the units and the undivided percentage in the placer mine. Now that preceded by 10 months the execution of Exhibit 99.

“We will remember that some of the money which had been realized from the same of these interests had been used in acquiring other properties; and so we find this Exhibit 99, executed at Portland, Oregon, on February 11, 1939, “Witnesseth:” as follows; it is only three para-

graphs; "Whereas the Party of the First Part has and still is financing the Party of the Second Part in acquiring and developing mines known as: St. John Bosco, also known as the French Hill Mine, in Del Norte County, California; the Norton Mines in Josephine County, Oregon; and the California Mine, also known as the Reuben Mine, on Graves Creek, Josephine County, Oregon.

"Now, Therefore, It is hereby agreed between said parties that the ownership of said mines shall be held on a basis of 60% to the party of the First Part and 40% to the Party of the Second Part, and that a more formal agreement covering the description and method of operation shall hereinafter be entered into between the parties, including proper transfers of title as the respective interests may require.

"So what we find here is a restatement of the percentages already agreed to before and the straight 60/40 division of the property to take the place of the 49/51 division referred to in Exhibit 82. Exhibit 82 refers to the Suetter mine and also the Bosco mine. Previously the interest of the Archbishop in the Suetter Placer Mines was designated by units. Now the units have been abandoned and instead we have ownership of 60 in favor of the Archbishop and 40 in favor of Suetter.

"An action was instituted thereafter for an accounting and a suit was brought in the Circuit Court of Josephine County on June 1,

1939. The Complaint was verified by Monsignore O'Laughlin as the agent of the plaintiff by virtue of power and authority granted to him, and we find that he had been in the State as the representative of Archbishop Beckman and he is referred to in letters which form the basis [100] of Counts Three and Four.

“We have oral testimony about the meeting of June 2, and the result of the meeting after the institution of this action was the execution by the parties of Government's Exhibit 101, an agreement dated June 17, 1939, whereby the Archbishop acquired all the right in the Suetter mines in Del Norte County, and he agrees to pay Mr. Suetter \$20,000.00 and to allow him to keep the Josephine Mines. We find from the testimony that \$10,000.00 was paid and later on Mr. Suetter still insists in some letters the Bishop still owes him some money. I think he is mistaken because the record shows over a year afterwards on August, 1940, Exhibit 103, Archbishop Beckman's letter to August Walker, Ford McCormick, and Monsignore O'Laughlin, dated August 29, 1940, he surrenders to Suetter in lieu of \$10,000.00 certain mining equipment which is therein described.

“If we examine the letters which form the basis of Counts Three and Four it becomes very apparent in the light of the examination which I have made that they could not possibly be tied to any scheme to defraud in the sale of a security. The sales had been complete long

before. The parties were dealing at arms length. Archbishop Beckman, mistrusting Mr. Suetter, had placed one of his own men on the place. Any representatives such as to the interest of Mr. Montag has been long past and forgotten and merged into the subsequent dealings with the knowledge of it, which of course, in civil law and criminal law fraud amounts to a waiver of the fraud. But it is very significant to find that Archbishop Beckman, on page 26 of the transcript which has been prepared for me, states specifically that he knew of Mr. Montag's interest about 6 months after he met Suetter. The only thing he didn't know is how the interest was secured, but he did say that he heard about Montag and he knew that Montag had an interest in the property. This appears on page 26 and reads like this, question by Mr. Dillard: "What about the title to the property: What other persons, according to your information, had an interest in the title to the property?" Answer: "I had heard after that that Mr. Montag had an interest in it, had a title—had rights to it. Question: "You heard that afterwards?" Answer: Some time—Originally when Mr. Suetter came to me he represented the mines as his own personal exclusive property, and I asked him, 'Is there anybody else in on it?' He said: No; all mine. Some time after that somebody or other told me that his housekeeper had a share in it, and I asked him about it. He says 'No; she has nothing to do

with it.' And I started pressing and urging, and he finally admitted there was a Mr. Montag had put money into it; but he always assured me that Mr. Montag would get his share out of his, Suetter's, share; it would never affect me. Question: About when did you learn of the interest of Mr. Montag? Answer: Oh, it must have been perhaps six months after I had met him—had met Mr. Suetter. Question: And about when did you learn, or did you ever learn, the fact that Mr. Montag was the holder of a mortgage for the purchase price of the property? Answer: I never heard of it."

"So it is quite apparent that he knew there had been misrepresentations as to the title six months afterwards at a time when many of these notes had not been sold. Negotiations had afterwards and settlements were had with a full knowledge of the facts, continues to deal with a person in- [101] stead of standing upon his rights and insisting in making good the representations or rescinding the contract. So we find not only absence of any rescission of the sale, but we find in early '38 an attempt of Archbishop Beckman of placing his relationship on a sounder written basis, which resulted in merging the entire unit situation and unit sale into a clear ownership on a percentage basis. So that in light of the fact that the jury has found there is no continuity of the scheme so far as the sales are concerned, the correct legal conception would not warrant the

inference that the scheme was continued unless there were further correspondence relating to further units of interest. I may say that that is the case so far as Bishop Rhode is concerned; but we are talking now merely as to Archbishop Beckman. Whatever money was advanced after that, after the agreement of February 1939, was that of a joint venture with equal purpose, and even that was terminated by the June agreement when they gave themselves a bill of divorcement and they each went their way.

“Now, if we examine the letters which form the basis of the Beckman counts, as we have called them, we find the one on Count Three is dated May 28, 1939, just three days before the complaint was signed. I assume the complaint was in preparation because I am paying a compliment as one student to another, a high compliment to the man who drew the Bishop’s complaint for accounting on the basis of a trusteeship, asking for an account of the moneys to be made. That complaint must have been in preparation before, because I cannot conceive any lawyer just calling in Mrs. Jones and starting in to dictate that kind of a document, no matter how prominent a lawyer, so that can’t be done in so short a time. So this defendant evidently by this letter—Suetter was endeavoring to call off the police dogs. You might call it, to use an ordinary expression, was telling the Archbishop that he has a substantial interest in the mine and that if he would allow him to go ahead and exploit that

they would all be all right, and asked him to stop interference with O'Laughlin and so forth. Well, it is true there is a statement about how much money he needed and there was also a request for money. You must bear in mind that the relationship between the parties was strictly established the year before, and reaffirmed by the Contract of February 11th of that same year, and it was just one partner writing another and merely asking for money with which to operate. No question of selling any security. The percentage remained as it had been fixed before, so this cannot be said, by any stretch of the imagination, to say it was a continuing demand relating to sale of securities. We are not talking here about a prospectus sent out in the general public.

“In the Olsen case which I tried they charged him—Olsen v. U. S.—in that particular venture there was a continuous offer to the public and while they were asking money from one man they were propositioning other people, so I held there was a continuity in scheme; but we are not dealing with that kind of scheme here. This was an inside deal, and the deal so far as Beckman was concerned in the acquisition of units had actually terminated by the assumption of a general venture in which he got a definite percentage in exchange for the units which had been sold him before.

“Now the Count Four letter is identical with it. That is dated the same; that is dated the

following day, May 29th. [102] In that particular case we find him again telling his troubles. He talks about the engineer Walker. Incidentally, Walker was one of the committee that were in charge of the affairs and it was to Walker that this letter of August 29, 1940, and to two others, was addressed. They were complaining about Walker and there were further statements relating to the need for further exploitation during the summer. But as I said before, the relationship was already established and I cannot hold that these relationships were a continuing offer or attempt to get him to invest more money because under the contract he was bound to give his share to produce his share in the development of the mine. The law would read into any venture where it is agreed to divide the ownership a certain way an agreement to divide losses and an agreement to contribute his share. The law of joint venture is the same in Oregon as it is anywhere else.

“So, gentlemen, I am of the view that a thorough analysis of the evidence in the light of the verdict of the jury, in the light of the jury’s findings that there was no continuous scheme in the first two, in the light of the fact that we are limited as to the counts to the particular transaction, but we do not have here a continuous offer to the public at large, but sales to specific individuals, that there is no evidence to sustain the verdict of the jury as to Counts Three and Four.

I don't like to be guilty of what the French call "Esprit d'escalier"; that is; stairway wisdom. That is the bright remarks that occur to you after you leave the friend's house. The bright remarks that you didn't say that you could have said. So I do not try to judge what I did or what I did not do in the past. Perhaps I was in error in not granting the motion to dismiss. I am not trying to justify my action on the light of the past. Our entire judicial system is postulated on the possibility of error and the motion for new trial has no other object. While it is not granted very often, I have been known to grant it. It may well be that perhaps if I had had the clear vision of the case that I have now I might have reached the conclusion that regardless of any possible verdict on Counts One and Two, that so far as Counts Three and Four were concerned, the evidence was clear that the sale had been terminated. I give counsel credit for urging that point. I cannot say—I haven't the portion of the transcript—I cannot say whether in denying it I had in mind the possibility that might arise from the finding of the jury of guilty on the first counts. If I made an error, why, I am willing to acknowledge it. At any rate, it is clear to me in the light of the record as I understand it now that there is absolutely no evidence whatsoever on which a conviction could be based or be sustained and that if an appeal were taken from the

denial of a motion for a new trial I am quite certain that this Court would be reversed as to this question.

“I am also of the view that in view of this conclusion, in view of the nature of the evidence before the Court, I should not only grant a new trial, but I will grant a new trial as to counts Three and Four, and in the interests of justice and upon the ground that the evidence is insufficient to warrant any conviction in the light of the record, [103] I shall dismiss the two Counts indicated. So the order will be: Motion for a New Trial granted as to Counts Three and Four of the indictment and the Court for the reason indicated, because there is no evidence upon which any jury could, now especially that the Government could not retry the issue of the mail fraud counts, find the defendant guilty, the Court orders the two counts dismissed. The motion for new trial as the Counts Six and Seven will be as to each of them denied. I shall not go into detail as to that other than to point out as to Bishop Rhode the situation which I found to exist as to Archbishop Beckman did not obtain. Bishop Rhode was in all respects an investor; he was buying units, and every time he was advancing money he was doing it in exchange for units; and as to him there was a constant offer and re-offer and constant demand for money in exchange for units. So we find Count Six, dated July 27, 1939, letter from Bishop Rhode transmitting

\$2,000.00 and asking that the units be sent to him, certificates for three units, two paid by the present check and one by the check of May 8th last. So we had clearly a continuance of the solicitation and purchase. This is also evidenced by the letter of August 25, 1939. Mr. Suetter continues his solicitation. He says he is not able to send the units because his equipment is elsewhere. It was in Portland. And he said: "Would have forwarded your units but all of my office equipment and records are packed in Portland." And then he said he was getting ready to open up and couldn't the Bishop invest some more; he wants another \$5,000.00. He said he will carry the payroll but 'I would appreciate another five thousand to purchase the equipment. I will carry the payroll. This will result in quick returns.'

"So we have an entirely different situation. We don't have him saying to Bishop Rhode as he said to Archbishop Beckman: Here, you and I are partners; we need this money; and we are sitting on one hundred million dollars. He just said, give me more money; invest more and you will get quick returns. So that as to Bishop Rhode we find the scheme was absolutely continuous.

"Now, we do not even have to do any rationalizing as to any reationalization. It is true the scheme to defraud is the same scheme that existed as to letters or Counts One and Two, which were also Rhode letters. But per-

haps members of the jury—there were some real estate men familiar with the problem of closing, what they call closing a transaction; real estate men use it especially. There are certain salesmen that can start a prospect, get him interested, but they are not what they call “closers”, so they trot out the prima donna who they call the “closer” and he starts in after the prospect and closes the deal. These letters were closers, and there is absolutely no inconsistency between the finding as to the Rhode letters in Counts One and Two and as to these letters. These letters are clearly letters of solicitation to him, asking the sending of money in pursuance of a continuous demand for further investments on promise of quick returns.

“So that the verdict of the jury here does not in any way conflict, so far as the existence of a scheme to defraud is concerned, with the negative finding of the jury [104] as to Counts One and Two, and the motion for a new trial as to Counts Six and Seven and as to each of them will stand denied.”

To which ruling of said Court in failing to grant a new trial or to dismiss the conviction as to Counts Six and Seven defendant, by his counsel, then and there excepted.

Thereupon the Court rendered its sentence and judgment upon said verdict which sentence and judgment is as follows:

"It is the judgment of the Court, Phillip Suetter, that for the offense in which you stand convicted, on Count Six of the indictment, you be sentenced to a penal institution to be designated by the Attorney-General for a period of two and one-half years. It is the judgment of the Court that for the offense of which you stand convicted, on Count Seven of the indictment, you be sentenced to a penal institution to be designated by the Attorney-General for a like period of two and one-half years; but because the facts underlying both these counts are the same, the transaction is one, and taking also into consideration the recommendation of the jury, and your age, it is the judgment of the Court that the sentence on Count Seven shall run concurrently with the sentence on Count Six, so that only the total number of years to be served shall be two and one-half years."

And now in the furtherance of justice, and that right may be done, the defendant, Phillip Suetter, tenders and presents the foregoing as his Bill of exceptions in this case, and prays that the same may be settled and allowed and signed and sealed by the Court and made part of the record, and the same is accordingly done this 12th day of April, 1943.

LEON R. YANKWICH,
Trial Judge.

State of Oregon,
County of Multnomah—ss.

Due and legal service of the foregoing bill of exceptions is hereby admitted in Multnomah County, Oregon, this 2 day of Apr., 1943.

J. MASON DILLARD,
Asst. Dist. Attorney for
Oregon.

[Endorsed]: Filed April 13, 1943. [105]

In the District Court of the United States
for the District of Oregon

On Appeal

No. C-16075

UNITED STATES OF AMERICA

vs.

PHILLIP SUETTER,

Defendant.

ASSIGNMENT OF ERRORS

Comes now, the Defendant, Phillip Suetter, by W. J. Prendergast, Jr. and David Weinstein, his attorneys, and having made and filed his Notice of Appeal in accordance with the rules of the Supreme Court of the United States promulgated under authority of Congress (Act of March 4, 1934) now makes and files forthwith this, his Assignment of

Errors, and says that in the trial of the said case, and in the records, proceedings, rulings, and judgment aforesaid, manifest error has intervened to his prejudice, namely:

1. The evidence in the case did not demonstrate, beyond a reasonable doubt, the defendant's guilt.

2. The evidence disclosed:

(a) The verdict and judgment are contrary to the law.

(b) The verdict and judgment are contrary to the evidence.

(c) The evidence is manifestly insufficient to support the verdict of the jury.

(d) The evidence is wholly insufficient to show the guilt of the defendant, beyond a reasonable doubt.

3. The Court erred in admitting, over defendant's objection, all of the evidence without requiring the United States to designate or elect as to which count or counts in the indictment such evidence was directed.

4. The Court erred in denying defendant's motion to dismiss Counts One, Two, Three, Four, Five, Six and Seven, at the close of the case for the United States.

5. The Court erred in denying defendant's motion for a new trial as to Counts Six and Seven of said indictment.

6. The Court erred in holding that there was no inconsistency in the jury's verdict.

Wherefore, Appellant prays that the judgment of the District Court of the United States may be reversed and held for naught.

W. J. PRENDERGAST

DAVID WEINSTEIN

Attorneys for Appellant

PHILLIP SUETTER

Appellant

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing assignment of errors is hereby admitted in Multnomah County, Oregon, this 24th day of Dec., 1942.

J. MASON DILLARD

Deputy District Attorneys for the United States
for the State of Oregon.

[Endorsed]: Filed Jan. 18, 1943.

[Endorsed]: No. 10300. United States Circuit Court of Appeals for the Ninth Circuit. Phillip Suetter, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed February 17, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10-300

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES

Comes now the appellant in the above entitled cause and respectfully submits to this Court a statement of the points upon which the appellant intends to rely, as follows:

1. The Court erred in failing to grant the defendant's motion for dismissal at the close of the case for the United States.

2. There is no evidence to support the verdict of the jury.

3. The Court erred in admitting into evidence, over the objection of the defendant, Government's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 36, 37, 38, 40, 42, 57, 67, 79, without requiring the United States to designate, or elect, as to which charge, or charges, in the indictment the evidence was directed.

4. The Court erred in failing to set aside the verdict of Guilty on Counts Six and Seven and

dismissing the indictment for the reason that the jury, in finding the appellant not Guilty on Counts One and Two, a fortiori, found appellant Not Guilty of the crime charged in the indictment, there being only one alleged scheme to defraud, and the verdict was therefore inconsistent.

Respectfully submitted,

W. J. PRENDERGAST, Esquire,
Spalding Building
Portland, Oregon

DAVID WEINSTEIN, Esquire,
Spalding Building
Portland, Oregon
Attorneys for the Appellant

State of Oregon,
County of Multnomah—ss.

Due and legal service of the foregoing statement of points upon which appellant relies is hereby admitted in Multnomah County, Oregon, this 29th day of April, 1943.

WILLIAM H. HEDLUND
of attorneys for the United
States

[Endorsed]: Filed May 1, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE TRAN-
SCRIPT OF THE RECORD TO BE
PRINTED.

1. Indictment.
2. Record of Plea of Not Guilty.
3. Verdict.
4. Motion for New Trial.
5. Order allowing Motion for New Trial as to
Counts Three and Four.
6. Order dismissing Counts Three and Four of
Indictment.
7. Order Denying Motion for New Trial as to
Counts Six and Seven.
8. Sentence of Defendant.
9. Notice of Appeal.
10. Order Fixing Amount of Bail pending Ap-
peal and for Release of Defendant.
11. Order Approving Bond pending Appeal and
to Release Defendant.
12. Praecipe for Transcript of Record.
13. Certificate to Transcript.
14. Bill of Exceptions in its Entirety.

15. Assignments of Error.

16. This Designation of Parts of the Record.

Respectfully submitted,

W. J. PRENDERGAST

Spalding Building,

Portland, Oregon

DAVID WEINSTEIN

Spalding Building,

Portland, Oregon

Attorneys for Appellant.

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing designation of parts of transcript to be printed is hereby admitted in Multnomah County, Oregon, this 29th day of Apr., 1943.

WILLIAM H. HEDLUND

of attorneys for the United
States

[Endorsed]: Filed May 1, 1943. Paul P.
O'Brien, Clerk.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeal from a Judgment of Conviction in the District
Court of the United States for the District
of Oregon.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeal from a Judgment of Conviction in the District
Court of the United States for the District
of Oregon.

STATEMENT OF FACTS

The defendant, Phillip Suetter, was indicted by the Grand Jury for the District of Oregon on the 23rd day of May, 1942, and charged, in an indictment containing seven counts, with the violation of Section 77q(a) (2) of Title 15, U.S.C.A. and Section 338, of Title 18, U. S.C.A. Counts one and two of the indictment charged a violation, by the defendant, of Section 338 of Title

18, U.S.C.A., which said counts charged the defendant with the use of the United States Mails in furtherance of a scheme, or artifice to defraud, hereinafter referred to as the "Mail Fraud" counts; counts three to seven, inclusive, charged the defendant with the sale of securities and the use of communications in interstate commerce, in furtherance of a scheme or artifice to defraud, under section 77q(a)(2) of Title 15, U.S.C.A., hereinafter referred to as "Securities" counts.

The particular code sections alleged to have been violated read as follows :

"Section 338, Title 18, U.S.C.A.; Using Mails to Promote Frauds; Counterfeit Money.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through any correspondence, by what is commonly called the 'sawdust swindle', or 'counterfeit money fraud', or by dealing or pretending to deal in what is commonly called 'green articles', 'green coin', 'green goods', 'bills', 'paper goods', 'spurious Treasury notes', 'United States goods', 'green cigars', or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting to do

so, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any postoffice, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than \$1,000, or imprisoned not more than five years, or both."

"Section 77q, Title 15, U.S.C.A.; Fraudulent interstate transactions.

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading or * * *."

The particular allegations of the act comprising the "Scheme or Artifice to Defraud" alleged in the indictment (Rec. pp. 4, 5, 6, 7, 8, 9, 10, 11) are re-alleged by reference, and referred to in each count. Thus the

United States has alleged but one "Scheme or Artifice to Defraud" as the basis for each and all of the seven counts in the indictment.

The indictment alleges that the defendant, Phillip Suetter, did, between the 15th day of January, 1934, and, continuously thereafter, up to and including the 30th day of June, 1941, devise and intend to devise, a certain scheme and artifice to defraud, and for obtaining money and property, by means of false and fraudulent pretenses, representations and promises, from a certain class of persons (Rec. pp. 3, 4).

The evidence adduced by the United States, at trial, showed that the defendant was the owner of certain mining property in Josephine County, Oregon. It was further proved, by the testimony of Ralph T. Montag, government witness, that Suetter was associated with the Montag in the operation of the mining properties and that Montag had advanced considerable capital, and was, in fact, a silent partner (Rec. pp. 83, 85, 86, 87).

Montag, as security for the money advanced to Suetter, had taken a mortgage on the mining property and was advancing necessary expense money to Suetter in the operation of the mines (Rec. pp. 59, 60). Montag was fully advised as to Suetter's actions in regards the property and his efforts to finance the development of the property, and his activities and efforts to raise money in Chicago and elsewhere. (Rec. pp. 86, 87; Govt's Exhibits 7, 8, 9, 10, 12, 13, 14, 17).

At the close of the examination of Ralph T. Montag, who was one of the persons alleged to have been defrauded, that witness, in answer to certain questions propounded by the Court, answered as follows: (Rec. pp. 86, 87).

“COURT: Mr. Montag, as I gather from your testimony, you at all times knew what was going on?

A. Yes. No, I won't say I knew all.

COURT: I mean, you knew most—

A. Yes.

COURT: —of what was going on, and by your letters you showed—by the letters you received from Mr. Suetter and some of his replies, he was trying to account to you for the progress of the—I call it the exploitation of the mine—the working of the mine?

A. Yes.

COURT: And while you were furnishing the money he tried to give you an account every week, or every so often, as to where the money went; is that correct?

A. No, not quite that way. He would tell me at times.

COURT: He would tell you at times?

A. Yes.

COURT: Because you were always kicking, that you didn't want to put in any more money; isn't that the idea?

A. Yes.

COURT: Then after he went east you have already stated you knew he went there to raise money?

A. Yes.

COURT: In other words, you are not complaining that Mr. Suetter in any way misrepresented anything to you in order to get your money, are you?

A. No, I don't claim that.”

The testimony of the witness, William Phillips, sales engineer for Link-Belt Company, and one of the persons alleged to have been defrauded, was, to the effect, that he had made a personal investigation of the property and had made a test of the ground as to metallic content, and found the tests "very satisfactory." (Rec. p. 108) There was also proof that Phillips had recommended the property to Archbishop Beckman and to others. (Def. Ex. 46, Record, p. 110). Phillips further stated that his independent tests showed that Suetter had not exaggerated in any way and that the statements made by Suetter in regards the gold content of the property were "very conservative". (Def. Ex. 46). The further evidence from Phillip's testimony was that employees of the Link-Belt Company had invested in units in the Suetter Placer Mines, relying on the tests made by their Company, and that after there had been a cancellation by the Link-Belt Company of a contract for purchase of equipment by Suetter, both the employees of Link-Belt Company, who had invested with Suetter, and Phillips were still favorably interested in the property as investors. (Rec., p. 115) In regard to the value of the property, and as to whether or not the units were a good investment, Phillips testified: (Rec., pp. 115, 116)

"Q. You testified Suetter said he would like you to have four more units because they were a good investment?

A. That is right.

Q. As a matter of fact you told Suetter they were a good investment, didn't you?

A. I believed that."

Phillips also testified that he had shown moving pictures of a dredge in operation similar to one that Suetter proposed to buy from Link-Belt Company for \$250,000, and that said motion pictures were shown at the Stevens Hotel in Chicago in the presence of Archbishop Beckman and eight or ten other priests. (Rec., pp. 101, 102) There was also testimony by Phillips that he had supplied Suetter with a photographic cut of a gold dredge, and it was used on the heading of the Trust Units; that Phillips had seen the photographic cut used on the printed stock certificates or units, on January 2, 1937, shortly after the certificates or units were printed, and made no protest as to the use of said photographic cut by Suetter for such purpose, and that, prior to January 2, 1937, Suetter had no units or stock certificates and had offered none to Phillips. Phillips' testimony also revealed that he considered himself the owner of units in the Suetter Placer Mines, although the only thing of value Phillips had ever parted with was a promissory note to Suetter, which note had been returned to him by Suetter in Chicago. (Rec., p. 117)

Reverend Steven A. Bubacz, one of the persons alleged in the indictment to have been defrauded, testified that the money he had advanced to one, Ed Hogan, had been advanced on Hogan's representation that he, Hogan, was the owner of the Josephine Mines. His testimony was also to the effect that several months after the advance of the money to Hogan he met the defendant, Phillip Suetter, and that Suetter informed Rev. Bubacz, at that time, that Hogan was not the owner of

the properties. Father Bubacz' testimony also established the fact that Suetter had never sold any Units to Bubacz or made any representations to Bubacz as to the value of the property in any effort to obtain anything of value from Bubacz, but that Suetter had given to the witness, Father Bubacz, shares, or units, in the Suetter Placer Mines, without consideration, in an effort to rectify the misstatements made by Hogan. (Rec., p. 121) Father Bubacz also testified that he had arranged for the defendant, Suetter, to meet both Bishop Rhode and Archbishop Beckman. (Rec. p. 122) In regard to the telegram charged by the United States as being the basis for Count Five of the indictment, Bubacz testified that it related to the terms of a settlement between Suetter and Archbishop Beckman and had no reference to any sale or offer of securities or any other transaction. (Rec. p. 122) Bubacz also testified that he had discussed the mines and their potential values with William Phillips, of the Link-Belt Company, and with Archbishop Beckman, and that he had knowledge of the results of the independent tests made by Phillips and the Link-Belt Company. (Rec. p. 123)

The testimony of Bishop Paul P. Rhode was that he had met Suetter in Green Bay, Wisconsin, in 1937, and, on the occasion of his very first meeting with Suetter he offered and gave Suetter \$5000, for five units in the Suetter Placer Mines. (Rec. p. 123) Bishop Rhode testified the reason being that he had previously discussed the mines with Father Bubacz on at least two occasions (Rec. pp. 128, 131) before he had met

Suetter, and that the basis of his last investment of \$2000 was the recommendation of Archbishop Beckman, after the latter had visited the mines in the spring of 1939. (Def. Ex. 73). Bishop Rhode testified that he knew Archbishop Beckman was interested in the property, from a conversation with Father Bubacz that had taken place sometime before Bishop Rhode had met the defendant, Suetter, and that he also knew that Phillips, the engineer of the Link-Belt Company, was interested in, and that he had personally invested in the mines. (Rec. pp. 134, 135)

Bishop Rhode testified, also, that Suetter had never displayed any mining reports or engineer's reports to him, but had only shown him a bottle of gold dust, and had talked about the property and the possibilities of gold recovery by the use of proper equipment, only in a general way. (Rec. pp. 136, 137) In relation to the extent of the discussion of the properties with Archbishop Beckman, Bishop Rhode acknowledged writing a letter to Suetter commending him for his work on the mines. (Def. Ex. 73, Rec. pp. 154, 155, 156), Bishop Rhode also testified that he had commenced a civil action against Suetter to recover the money he had invested, and had dismissed the civil action against Suetter upon the promise of Archbishop Beckman that "I will take care of you"; that he knew about the lawsuit between Archbishop Beckman and Suetter and that he had been offered by Father Bubacz, 84 shares of stock in the "Hercules Mining Corporation", a company formed by Archbishop Beckman to operate the

properties ,in exchange for Rhodes' units or interest in the Suetter Placer Mines. (Rec. pp. 157, 158, 159) Bishop Rhode also stated that he still maintained an interest in the Suetter Placer Mines.

At the conclusion of his examination by counsel, a juror propounded the following question to Bishop Rhode:

“THE JUROR: Where did you get your competence and all to invest thirty thousand dollars through Mr. Suetter?”

A. I largely took that step on my own responsibility, *trusting what I heard in regard to Mr. Suetter*, and later on learning that the charges which had been preferred against him in Indiana and Illinois, I believe, had not been sustained, that he was declared innocent, I think, or at least exonerated. And what I learned from time to time from Mr. Suetter as he went along, because for a long time there was no trouble whatsoever, *everything* seemed to go along in a normal and satisfactory way, until the unfortunate break took place, and so I assumed full responsibility for the investment which I had made.” (Rec., pp. 164, 165) (Italics ours.)

The testimony of Archbishop Francis J. Beckman, one of the persons alleged to have been defrauded, was to the effect that before he made any investment with Suetter he had discussed the properties and their potential value with Phillips, of the Link-Belt Company, and that he had been informed by Phillips of the results of the independent tests made by Phillips and by the Link-Belt Company, some of these tests having been made, unknown to Suetter. (Ex. 46, Rec. p. 110) (Govt. Ex. 43, Rec. p. 102). His further testimony was

that he had received the first two units in the Suetter Placer Mines for money advanced to Ed Hogan before he had met Suetter. The evidence disclosed that Archbishop Beckman advanced approximately \$59,000.00 in cash and that he executed his promissory notes, and notes on the Archdiocese of Dubuque (Catholic), in the sum of \$253,750, payable to the order of the defendant, Suetter, as of May 14, 1938; that he had, subsequent to that time, between May 20, 1938 and March, 1939, advanced to Suetter \$40,000 in cash. (Rec. p. 172). The further testimony of Archbishop Beckman was to the effect that he had visited the property and made a personal inspection thereof, the last of said trips being in the spring of 1939.

The evidence disclosed that Beckman had first issued promissory notes to Suetter bearing only the signature of Francis J. Beckman, but that, some time later, the notes were changed to read "The Archdiocese of Dubuque, Iowa, by Francis J. Beckman, Archbishop." (Rec., pp. 184, 185) It was also shown that in March, 1938, Suetter executed an additional agreement with Beckman regarding the properties (Gov. Ex. 79) but that Beckman was not satisfied with such agreement because there were others interested in the properties besides Suetter and Beckman, and he insisted that a new agreement be drawn giving to Archbishop Beckman 60% interest in the property and allowing Suetter a 40% interest. (Rec. pp. 188, 189) Archbishop Beckman's testimony further showed that he had visited the property in February, 1939, and, at that

time, all of the properties were in operation,, although little gold recovery was then being made. (Rec. p. 189)

The cross-examination of Archbishop Beckman revealed that he met Suetter at the Stevens Hotel in Chicago, and had inspected moving pictures displayed by the witness, Phillips, of the Link-Belt Company, and that he had discussed the properties with Diax, the Archbishop's personal mining engineer, who stated that the properties had not been properly tested; that he had also, personally, discussed the property with Phillips who favored the venture. (Rec. p. 183'); that there was also a discussion, at that time, as to the type of machinery that would be needed. (Rec. p. 184) Archbishop Beckman's further testimony was that, although he knew, at the time of execution of Exhibit 79, agreement, in March, 1938, that Bishop Rhode, Father Bubacz and Ralph Montag were all interested in the properties, he, Archbishop Beckman, demanded 60% control of the properties stating that he felt that he had put in by far the most money. (Rec. p. 188) Beckman also testified that he continued to invest in the properties after he knew of the existence of Ralph Montag's interest and that the accounting contained in Govt. Exhibit 82 showed that Beckman had executed \$253,750, in promissory notes and made an agreement as to the division of interest in the properties as between Beckman and Suetter. (Rec. p. 188) In regard to his visits to the mines, Beckman testified that he had visited and inspected them, first, in February, 1939, again in the early part of May, 1939, and again,

in the latter part of May, 1939. Archbishop Beckman stated that he knew that Suetter was "bungling" but that he believed in his honesty and believed that Suetter had a legitimate enterprise. (Rec. p. 189) He stated that he had written Defendant's Exhibit 97 after his first visit in 1939 and at that time everything was going "full blast" and "it looked awful good to me".

Archbishop Beckman testified that he had written Def. Ex. 98 on May 14, 1939, and that prior to that time, February 11, 1939, he had obtained from Suetter an agreement whereby Suetter had transferred 60% interest in the mines to Archbishop Beckman. (Rec. pp. 190, 191, 192).

Archbishop Beckman's further testimony was to the effect that he had placed a personal representative on the properties, one Monsignor O'Laughlin, who later filed on June 1, 1939, a civil action, as the Archbishop's agent, against Suetter for an accounting and to enjoin Suetter from operating the properties, and that the suit was settled by Suetter turning over, to Archbishop Beckman, \$171,250 of the promissory notes of the Archbishop, and by turning over all of the mining properties, except the Josephine mines, to Archbishop Beckman, and turning over all of the equipment thereon; that Archbishop Beckman then agreed to pay Suetter \$20,000 and to assume any claims of Bishop Rhode and Father Bubacz. (Rec. pp. 193, 194) The \$20,000 had not, at the time of trial, been paid, and Archbishop Beckman, and others were, without Suetter, operating the other properties under the name of

“The Hercules Mining Corporation”.

An accounting prepared by I. R. Perry from the records of the Suetter Placer Mines was offered by the United States, being Exhibit 104, showing expenditures by Suetter of \$301,644.14, as of April 30, 1939, and showing that the defendant, Phillip Suetter, and his wife, Anna Suetter, had received the sums of \$40,955.65 and \$2,250.00 respectively. Perry testified that the accounting or trial balance was made from cancelled checks, original invoices, letters and other information supplied by the defendant Suetter and that it was a correct summary of the records supplied. (Rec. pp. 196, 197, 198, 199, 200).

At the close of the case for the United States, defendant, through his counsel, moved the Court for an Order dismissing the charges against the defendant on the ground, and for the reason, that the United States had failed to prove any fraud, or fraudulent scheme or artifice to defraud on the part of the defendant Suetter and that the United States had failed to sustain its case. This motion was, then and there, denied by the Court, to which ruling the defendant, by his counsel, then excepted. (Rec., p. 203).

The defendant, Phillip Suetter, thereupon, was called as a witness in his own behalf and his testimony was, that prior to 1927 he was engaged in the business of trading horses and livestock in Portland, Oregon. He testified that in the depression years of 1930-33 he had lost everything and had gone bankrupt in 1933.

After the bankruptcy, he had gone to Southern Oregon and taken up a mining claim, and that he later secured an option on the Josephine mines, then owned by Judge Norton, in June, 1934. (Rec. p. 204) The defendant Suetter admitted having sent the letters and used the other means of interstate communications, but denied any scheme to defraud.

The cross-examination revealed that Suetter had met Ed Hogan in Grants Pass, Oregon, and that the latter had approached Suetter and agreed to raise money for him to develop the Josephine Mines, after Ralph Montag had stated he was unable to invest further. The testimony of Suetter was to the effect that he had supplied Hogan with a car and certain expense money and that Hogan was to receive 20% commission on any money raised and 5% interest in the mines. (Rec. p. 207). Suetter also testified that he had gone to Chicago seven or eight months after Hogan had left, to check up on Hogan, who had stopped reporting to him, and learned at that time that Hogan had apparently misrepresented the ownership of the mines to Father Bubacz and to Archbishop Beckman, who had both advanced some money to Hogan. (Rec. p. 208) The evidence further disclosed that Suetter was in constant communication with Ralph Montag about his activities and efforts to raise money for equipment and the development of the mines. (Rec. pp. 208, 209, 210, 211, 212, 213, 214, 215.) (Govt's Ex. 112, 113).

Suetter had also informed Montag of the type and cost of machinery declared to be necessary by the Link-

Belt people in order to develop and operate the properties. (Govt. Ex. 114) In regard to his assets at the time of the exercise of his option to purchase the Josephine Mines from Judge Norton, Suetter testified that Ralph Montag had put up a considerable portion of the money invested and that he, Suetter, had also borrowed from friends and his wife the balance invested; that he had made some recovery of gold which was used to meet expenses of operation. Suetter also testified that he, in fact, was the owner of the Josephine Mines, and that Ralph Montag did not want his name publically identified with any mining operation. (Rec. p. 219). In regard to the settlement of the civil lawsuit by Bishop Rhode, Suetter testified that the matter had been taken care of by Archbichop Beckman according to the Archbishop's prior agreement with Suetter (Rec. p. 220, 221), and that this settlement with Rhode was about a year after Suetter had settled with Archbishop Beckman. Suetter also testified that he had received a check for \$2,000, from Bishop Rhode after July 27, 1939 for the former purchase of two units in the Suetter Placer Mines based on a prior agreement by Bishop Rhode to purchase the Units. (Rec. p. 221)

The case was submitted to the jury under proper instructions by the Court, and a verdict returned finding the defendant "Not Guilty" as charged in Counts One, Two, and Five of the Indictment, and "Guilty", as charged in Counts Four, Five, Six, and Seven, with a recommendation of leniency. Thereupon the defendant, through his counsel, petitioned the Court for a

New Trial on the grounds that the Verdict of the jury in finding the defendant "not guilty" of the violation of the Mail Fraud Counts was inconsistent with their finding him "guilty" on the Securities Act Counts, as each required fraud on the part of the defendant, and only one scheme had been alleged in the indictment, and on the further ground that the Court had erred in allowing certain evidence to be admitted over the objection of the defendant and in refusing to require the United States to elect or designate as to which charge or charges in the indictment the evidence was directed. After hearing on said motion for a New Trial, the Court allowed the same as to the conviction on Counts Three and Four (involving Archbishop Beckman, holding he was a partner), and dismissing the convictions against the defendant as to those counts, but disallowed said motion for a New Trial and Dismissal as to counts Six and Seven (involving Bishop Rhode). (Rec. pp. 41, 42, 43, 44)

ASSIGNMENT OF ERRORS

POINTS AND AUTHORITIES

1. The Court erred in failing to grant the defendant's motion for dismissal at the close of the case for the United States.

Beckman v. United States, 96 Fed. (2d) 15.
Securities and Exch. Comm. v. Macon, 28 Fed.

Supp. 127.

U.S.C.A., Title 15, Section 77q.

Black's Law Dictionary, Second Edition, p. 521.
28 C.J. 1062.

2. There is no evidence to support the verdict of the jury.

U.S.C.A., Title 15, Sec. 77q, page 463.

Beckman v. United States, 96 Fed. (2d) 15.

3. The Court erred in admitting into evidence, over the objection of the defendant, Government's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 36, 37, 38, 40, 42, 57, 67, 79, without requiring the United States to designate, or elect, as to which charge, or charges, in the indictment the evidence was directed.

Jarvis v. United States, 90 Fed. (2d) 243.

Coplin v. United States, 88 Fed. (2d) 652; 57 S. Ct. 929, 81 L. Ed. 1357.

4. The Court erred in failing to set aside the verdict of Guilty on Counts Six and Seven and in failing to dismiss the indictment, for the reason that the jury, in finding the appellant Not Guilty on Counts One and Two, a fortiori, found appellant not guilty of the crime charged in the indictment, there being only one alleged scheme to defraud, and the verdict was therefore inconsistent.

Speiller v. United States, 31 Fed. (2d) 682.

Boyle v. United States, 22 Fed. (2d) 547.

Macklin v. United States, 79 Fed. (2d) 756.

Coplin v. United States, 88 Fed. (2d) 652.

Dunn v. United States, 284 U.S. 390, 82 S. Ct. 189, 76 L. Ed. 356.

Freeman v. United States, 96 Fed. (2d) 13, 59 S. Ct. 78, 83 L. Ed. 377.

People v. Doxey, 93 Pac. (2d) 1068.

People v. Hickman, 31 Cal. App. (2d) 4, 87 Pac. (2d) 80.

Commonwealth v. Kline, 107 Pa. Sup. 594, 164 A. 124.

People v. Andrasky, 75 Cal. App. 16, 241 Pac. 591.

People v. Herrigan, 218 Mich. 235, 187 N.W. 306.
23 C.J.S., Par. 1403, pp. 1094, 1095.

ARGUMENT

POINT 1

The Court erred in failing to grant defendant's Motion for dismissal.

At the close of the case for the United States the defendant, through his counsel, seasonably moved the Court for a dismissal of all of the charges contained in the indictment, on the ground that the United States had failed to prove that there was any scheme, or artifice to defraud, on the part of the defendant, or that he had sold any securities to anyone as a result of any false statements made by him.

We need here consider only the effect of any statements made by the defendant, Suetter, to Bishop Rhode pursuant to some scheme to defraud. The charges as to the others have been disposed of either by the acquittal or by the dismissal by the Court upon the motion and allowance of a New Trial.

A review of the testimony of Bishop Rhode shows that he had discussed the mines, the trust agreement, and the units with Father Bubacz on at least two occasions before he had even met the defendant, Suetter, and that he had knowledge of the mines and of who

else was interested. (Rec. pp. 128, 131, 134, 135, 164). Bishop Rhode's testimony also brought out the fact that he had knowledge that William Phillips, sales engineer for the Link-Belt Company, and Archbishop Beckman were investing personally in the mines from his conversations with Father Bubacz before he had even met the defendant, Suetter, and that on the occasion of his very first meeting with Suetter Bishop Rhode had invested \$5,000 in the Suetter Placer Mines for five Units. (Rec. p. 123). He also stated that the basis of his last investment of \$2,000 was statements made by Archbishop Beckman after the latter had visited the properties in the spring of 1939. (Rec., p. 156) The summation of his testimony regarding the reasons for his investments of \$30,000, with Suetter, is in the response to the following question by a juror :

“JUROR: Where did you get your competence and all to invest thirty thousand dollars through Mr. Suetter?

A. *I largely took that step on my own responsibility, trusting what I heard in regard Mr. Suetter, and later on learning that the charges which had been preferred against him in Indiana and Illinois, I believe, had not been sustained, that he was declared innocent, I think, or at least exonerated. And what I learned from time to time from Mr. Suetter as he went along, because for a long time there was really no trouble whatsoever, everything seemed to go along in a normal and satisfactory way, until the unfortunate break took place, and so I assumed full responsibility for the investments which I made.*” (Rec. pp. 164, 165). (Emphasis ours.)

The basis of the charges upon which the defendant was convicted is contained in Section 77q, of Title 15, U.S.C.A.: Fraudulent Interstate Transactions. In order to sustain its case, the United States was called upon, in the first instance, to prove some scheme, or artifice to defraud by the defendant Suetter. There are a great many definitions of fraud and fraudulent transactions. It has been defined as follows:

“Fraud consists of some deceitful practice or wilful devise, resorted to with intent to deprive another of his right, or in some manner do him an injury. As distinguished from negligence, it is always positive, intentional”. Black’s Law Dictionary, Second Edition, p. 521.

“It may be stated generally that the elements of actionable fraud consist of: (1) A representation. (2) Its falsity. (3) Its materiality. (4) The speaker’s knowledge of its falsity or ignorance of the truth. (5) His intent that it should be acted upon by the person and in the manner reasonably contemplated. (6) The hearer’s ignorance of its falsity. (7) His reliance on its truth. (8) His right to rely thereon. (9) And his consequent and proximate injury.” 26 Corpus Juris 1062.

In this case there is absolutely no proof that Bishop Rhode made any purchase of units from Suetter in reliance upon any statements or representations made by the defendant Suetter. On the contrary, the evidence shows that Bishop Rhode discussed the mines with Father Bubacz and with others, particularly Archbishop Beckman, and the information so obtained was the basis of Bishop Rhode’s investment. The statements of Bishop Rhode clearly show that he had knowl-

edge of the properties, and he stated in his testimony that he had made his initial investment of \$5,000 the first time he ever met the defendant, Suetter, and that prior to that time he had discussed the mines with Father Bubacz and possibly others. (Rec. pp. 128, 132, 133, 134, 135). He also testified that at this first meeting he had only discussed the properties generally and that Suetter at no time had shown him any engineer's reports or purported engineer's reports. (Rec. pp. 127, 128).

The important point of the charges against the defendant was not that he had obtained money or property and sold units or securities by the use of the mails or other means of interstate commerce, but that such means were used "to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary, in order to make the statements made, in the light of the surrounding circumstances under which they were made, not misleading".

In this case we have neither proof of any untrue statements made by the defendant, nor any withholding by the defendant of any material fact from Bishop Rhode. As already pointed out, the witness, Bishop Rhode, testified that he had made his investment originally on information he had received from Father Bubacz, and his final investment of \$2,000 (upon which the charges in the indictment are based) upon information supplied by Archbishop Beckman. Therefore there was a complete failure of proof as to any fraud

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or false representations on the part of the defendant. Suetter, or any withholding by him of any material fact and the charges should have been dismissed.

POINT 2

There is no evidence to support the verdict of the jury.

ARGUMENT

As heretofore pointed out in Point One, in the absence of any proof by the United States of fraud, or scheme or artifice to defraud, the government has failed to maintain its case. The jury could not have found the defendant guilty of the charges unless there was some proof that the witness, Bishop Rhode, had been defrauded by the defendant Suetter.

The rule has been stated generally that:

“Where guilt in a prosecution for using the mails to defraud, violating this section and a conspiracy rest upon circumstantial evidence, government has burden of proving its case *not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence*” (U.S. C.A., Title 15, Sec. 77q, page 463, citing Beckman v. U. S., 96 Fed. (2d) 15). (Italics ours.)

The testimony of Bishop Rhode shows conclusively that he invested with the defendant on its own responsibility trusting what he had heard about Mr. Suetter from other churchmen, priests, the Archbishop and others. (Rec., pp. 164, 165). The statements or

opinions of others regarding the mines, not made by the defendant, Suetter, would not be chargeable to him. Therefore, there is no proof that any money obtained from Bishop Rhode by the defendant, Suetter, was the result of any false or fraudulent statement made by Suetter, nor is there any evidence that anything was withheld from Bishop Rhode by Suetter.

As further proof that there was no fraud on the part of the defendant, Suetter, and that the money invested was spent as agreed, we refer to Government's Exhibit 104. This trial balance shows that Suetter had expended at least \$258,438 on equipment and in the operation and development of the mines, and that he had received, prior to June 30, 1941, \$19,000 from Ralph T. Montag (Government's Exhibit 16), \$30,000 from Bishop Rhode, (Government's Exhibit 64), and \$181,000 from Archbishop Beckman, (Government's Exhibits 79, 83 (Rec. pp. 167, 177) or a total of \$231,400.00. The trial balance shows an expenditure by Suetter of \$27,938.00, over and above the investments made, of his own money, in the purchase of equipment and in the operation of the mines, and that none of the money entrusted to him by the investors in the Suetter Placer Mines was used for his own benefit or for any other purpose than that intended and agreed upon in the Agreement of Trust. We therefore submit that there was a total lack of proof of any fraud on the part of the defendant, Suetter, and there is no evidence to support the judgment of conviction.

POINT 3

The Court erred in admitting into evidence, over the objection of the defendant, certain evidence without requiring that the United States elect, or designate, as to which charge, or charges, in the indictment, such evidence was directed.

ARGUMENT

The rule that the United States may be compelled, by proper objection by the defendant, to elect, or designate, as to which charge, or charges in the indictment certain evidence is directed, has been expressed as follows :

“The trial judge followed the customary method of admitting any evidence which bore on either indictment, *leaving to the defendants to ask to have any particular piece of evidence limited if they thought it should be.*” (Italics ours.)

Jarvis v. U. S., 90 Fed. (2d) 243.

The same rule was laid down as follows :

“As the appellants themselves pointed out in the court below and in their brief here, the check in question is the one described in Count IV of the indictment, on which count all of the defendants were acquitted. The defendants objected that there was no showing that any of them had mailed the check, but, when the court overruled that objection, *they did not ask that the jury’s consideration of the check should be limited to Count IV, and disregarded as to Count IX.*” (Italics ours.)

Coplin v. U. S., 88 Fed. (2d) 652; 57 S. Ct. 929, 81 L. Ed. 1357.

As heretofore pointed out, more than twenty-six exhibits were admitted; over the objection of the defendant, without requiring the United States to elect or designate as to which charge, or charges, in the indictment the same were directed. Certainly, nothing contained in any of the Exhibits identified by the witness, Ralph Montag, would have any tendency to prove the charges in the indictment, for Montag testified that he knew at all times what was happening in respects the mines. (Rec. pp. 86, 87) Montag never was a purchaser of any units in the Suetter Placer Mines, but was a silent partner with the defendant, Suetter, in the operation of the mines. (Rec. p. 83) As to the testimony of William Phillips and Father Steven Bubacz, the evidence discloses conclusively that they had made no investment with Suetter. The evidence shows conclusively that Phillips made an independent investigation of the mining properties and that he, Phillips, had recommended the mines as a good investment, not only to Archbishop Beckman, Father Bubacz and others, but had also made the same recommendations to the defendant, Suetter. (Govt.'s Ex. 43, Def. Ex. 46, Rec. pp. 102, 110).

We therefore submit that there was error in the admission, over proper objection, of the exhibits without requiring the United States to designate, or elect, as to which charge, or charges, in the indictment the same were directed.

POINT 4

The Court erred in failing to set aside the verdict of Guilty on Counts Six and Seven and dismissing the indictment, for the reason that the jury, in finding the appellant Not Guilty on Counts One and Two, a fortiori, found appellant not guilty of the crime charged in the indictment, there being only one alleged scheme to defraud, and the verdict was therefore inconsistent.

ARGUMENT

There are two lines of authority in regard to inconsistencies in Verdicts by a Jury, reported in the Federal Cases. *Speiller v. U. S.*, 31 Fed. (2d) 682 and *Boyle v. U. S.*, 22 Fed. (2d) 547, announce the proposition that an inconsistency in the verdict of a jury is grounds for reversal. *Macklin v. U. S.*, 79 Fed. (2d) 756; *Coplin v. U. S.*, 88 Fed. (2d) 652, both decided in the Ninth Circuit, and *Dunn v. U. S.*, 284 U.S. 390, 82 S. Ct. 189, 76 L. Ed. 356, all seem to hold that an inconsistency in the jury's verdict is not grounds for reversal, as did *Freeman v. U. S.*, 96 Fed. (2d) 13, 59 S. Ct. 78, 83 L. Ed. 377, decided by the Fifth Circuit.

In the case of *Macklin v. U. S.*, *supra*, the defendant was indicted for the violation of two sections of the internal revenue code. The Circuit Court of Appeals held that the gist of the offenses was different in the two sections and that the acquittal on one count would not bar a verdict of guilty on the other. There was no question presented in that case on appeal, as here, as

to whether or not a scheme or artifice to defraud had been devised. The case of *Dunn v. U. S.*, *supra*, was a prosecution on two counts, one charging the sale of intoxicating liquor and the other the maintenance of a nuisance by allowing liquor to be sold on the premises. That case also held that there was an inconsistency in an acquittal on one count and a conviction on the other, but again no question was presented as to a scheme to defraud. The case of *Coplin v. U. S.*, *supra*, was a prosecution of several defendants, some twelve or more, charging offenses of mail fraud, Section 77q(a)(2) of Title 15, securities act, and a conspiracy to perpetrate these crimes. The objection raised on appeal was that there was an inconsistency in finding three of the defendants guilty of having placed one phone call and a finding of not guilty on the conspiracy counts. Here the court pointed out that any of the defendants who aided in the placing of the call, or assisted in any way, would be guilty under the Federal Statutes as principals and therefore there would be no inconsistency, although the Court did state the proposition generally that inconsistency in the verdict is not grounds for reversal. *Freeman v. United States*, *supra*, was a prosecution under the Mail Fraud Statutes and the Securities act, Section 77q. In that case the Court charged the jury that in order to convict the defendant on any subsequent count, they must first find him guilty on Count One showing a scheme to defraud. The Circuit Court of Appeals refused to reverse the conviction on Counts Two, Three, Four and

Five, holding that they could not assume that the jury brought in a verdict contrary to the express instructions of the Court so they must have found a scheme to defraud but no use of the mails.

The rule regarding inconsistent verdicts is stated in 23 C. J. S., Par. 1403, page 1094, as follows :

“On the other hand, where the elements of the two offenses are identical, a verdict of not guilty on one count is inconsistent with a verdict of guilty on the other count. When accused is convicted on one count and is acquitted on another count, the test is whether the essential elements in the count wherein the accused is acquitted are identical and necessary to proof of conviction on the guilt count. A verdict which acquits accused of a crime which includes acts necessary to the commission of another crime for which he is found guilty is inconsistent. However, there is no inconsistency in verdicts of acquittal and of conviction on charges of crimes composed of different elements, but arising out of the same state of facts.”

In this case we do not have the question presented as to the mailing or the use of the other instrumentalities in interstate commerce. This was admitted by the defendant. (Rec. p. 203) So the sole question presented to the jury was whether or not there was some scheme or artifice to defraud in the sale of the units of trust.

We may assume, as a general proposition, considering the decisions of the Ninth Circuit Court of Appeals, that an inconsistency in a verdict, standing alone, would not be sufficient grounds for reversal. See *Macklin v. U. S.*, *Freeman v. U. S.*, *Coplin v. U. S.*, *supra*.

However, in the case at bar we have further facts to sustain our position that the inconsistency here is sufficient grounds for reversal.

The charges in the indictment are all based on a single, a same scheme, or artifice to defraud, re-alleged only by reference as to each Count. All of the evidence was admitted by the trial court, over the objection of the defendant, without requiring the United States to elect or designate as to which charge or charges in the indictment the same was directed. In neither case would the acts of the defendant have been of a criminal nature unless, *in the first instance*, some scheme or artifice to defraud was proved by the United States.

It is to be further noted that only one scheme or artifice to defraud was relied upon as the basis of all the charges contained in the indictments. *Precisely the same evidence to prove all of the charges was introduced by the U. S., over the objection of the defendant and over his insistence that the United States be compelled to designate, or elect, as to which charge, or charges, in the indictment certain evidence was directed.*

Certainly there was nothing in the testimony of Ralph T. Montag to prove any charge in respect to the sale of securities. Montag was never offered any securities; he was, in fact, a silent partner, and was fully informed by the defendant, Suetter, as to what his, Montag's, money was being used for. To the same

effect, the testimony of William Phillips and Father Bubacz proved that neither of them had parted with anything of value to the defendant, Phillip Suetter, in exchange for any units in the Suetter Placer Mines. Yet all of this evidence was admitted over the objection of the defendant and with no attempt by the court to limit this evidence to any particular charge or charges in the indictment.

We therefore submit that the Court erred in failing to dismiss the conviction on Counts Six and Seven because of the inconsistency in the verdict of the jury, or to grant a new trial as to those Counts.

CONCLUSION

The Indictment charges that the defendant, Phillip Suetter, devised a scheme and artifice to defraud and obtained money or property by means of false and fraudulent pretenses, in substance, as follows:

“1. That the defendant would purchase mining claims in Josephine County, Oregon.

“2. That defendant would declare himself as Trustee of the properties.

“3. That defendant dominated said trust.

“4. That defendant solicited persons to invest in the Suetter Placer Mines.

“5. That defendant so obtained \$5000 from W. E. Phillips by fraud.

“6. That defendant, in order to induce persons intended to be defrauded, and in order to enable defendant to convert a large part of the investment

so made, made alluring and specious predictions by means of circulars, telegrams, letters, and other written communications and statements.

"A. That defendant was sole owner of Suetter Placer Mines, when in truth Ralph T. Montag had a one-half interest in and held a mortgage on the mines.

"B. That defendant would keep an accurate set of books, which he failed to do.

"C. That defendant made false representations that employees of the Link-Belt Company would invest \$80,000 when, in fact, they had not agreed to do so.

"D. That the money invested in the units would be used for equipment and in the operation of the mines; that the money was not so used, but was converted by the defendant to his own use.

"E. That the defendant knew that the investors would not realize large returns.

"F. That an investment in units was represented by the defendant to be a safe and conservative investment, when in fact it was not.

"G. That defendant represented that he had engineers test the property who had submitted favorable reports, when in fact he had not.

"H. That production would begin by November 1937, and that it did not begin then.

"I. That defendant represented that he had a great deal of practical experience in mining, which he did not have.

"J. That defendant represented that an investment of \$300,000.00 would bring returns to the investor of, from one to three million dollars in three years.

"K. That defendant represented that he would commence shipping gold to the mint 90 days after

December 16, 1938.

"L. That dividends from the Suetter Placer Mines would amount to 20% of one hundred million dollars.

"M. That defendant represented that the properties were proven when they were not.

"N. That defendant represented that the investors would not lose when he knew that they would lose.

"O. That defendant represented he had invested \$50,000 of his own funds in the mines when he had not."

The testimony and evidence adduced by the United States proved that the defendant, Phillip Suetter, did have title, in his own name, to the Josephine Mines or Norton Mines, in Josephine County, Oregon; that he did execute a Deed of Trust as sole trustee, that he did have control of the properties; that he had solicited persons to invest in the Suetter Placer Mines and sold units therein; that W. E. Phillips had given the defendant, Phillip Suetter, a note for \$1,000, which had been returned, by Suetter, to Phillips, and that nothing else of value had ever been given by Phillips to Suetter; that the defendant had never made any particular promises regarding the mines, but did believe that they could be operated profitably with proper equipment; that Suetter had never converted any of the money so invested to his own use; that the predictions as to potential profits were made by Phillips, of the Link-Belt Company; that Ralph T. Montag was a silent partner of the defendant and he knew all about Suetter's efforts to raise money to develop the mines

and acquiesced in and ratified the acts of Suetter; that the defendant kept such books as enabled Government's witness Perry to make an accounting; that the employees of Link-Belt Company had made investments in the mines that had been returned to them; that the money invested in the units was used in buying equipment and in the operation of the mines, and none of the investments so made were used by the defendant personally; that any statements regarding potential profits were based on statements made by Phillips and the Link-Belt Company after they had tested the gravel from the properties; that the investors, particularly Archbishop Beckman and Bishop Rhode, were independently advised, by Phillips and others, as to the potential value; that the investors knew that this was a mining operation with certain elements of chance and that such operation was never represented by Suetter to be a safe investment, but that he *hoped* to return a profit; that there was no representation by Suetter to Bishop Rhode that the property had been tested; that the independent reports of Phillips, and others, were favorable; that there is no proof as to when production was to have begun, and no representations by the defendant that production, of gold, would begin at any particular time; that the defendant had been engaged in mining for some considerable time and had had successful ventures; that there was no representation as to the extent of the returns; that the only representations as to potential profits were independently made by Phil-

lips and the Link-Belt Company, although the defendant, naturally, expected a profit from the operation; that the record contains no statement, nor proof of any kind, that the defendant stated any particular time when he would start shipping gold to the mint, but that defendant did, from time to time, make shipments of gold to the mint; that there is no proof that defendant represented any particular sum or figure to be recovered from the properties; that the only estimate as to the extent of the recovery were the independent statements of Phillips and the Link-Belt Company as to the potential profits from the use of the dredge they planned to sell to Suetter, as contained in Government's exhibit 43 written by the witness, Phillips; that the properties had been worked and tested by the defendant and others; that the defendant hoped to realize a profit, and did expend more than \$240,000 in the development of the properties and for equipment; that the defendant had a considerable amount of his own money invested in the mines.

The foregoing is a brief summary of the charges contained in the indictment and the actual proof adduced by the evidence presented by the United States. The evidence discloses that the defendant, Phillip Suetter, had bought the Norton Mines in Josephine County, Oregon. In order to finance the operation he had obtained financial aid from one, Ralph T. Montag, a former partner, and when Montag was unable to further put any money into the development of the mine, Suetter looked for other money to buy the needed ma-

chinery. He was contacted by one, Hogan, who claimed certain connections from whom Hogan could obtain the needed money, and Suetter advanced expense money to enable Hogan to go East. Suetter did not hear from Hogan for some months, and finally located him in Chicago. Hogan had, in the meantime, contacted the Link-Belt Company, and Suetter went to the Link-Belt Company to purchase a modest amount of machinery which he could afford, and saw W. E. Phillips, their sales engineer, who promoted and convinced Suetter that he really needed a certain expensive type of their dredge to work the property properly, costing \$250,000.00 and that he, Phillips, would aid and help the old man, Suetter, to obtain the necessary financing for their more expensive equipment. Phillips and the Link-Belt Company ran their own independent tests of the mines, and, based on these tests, made their recommendations to Archbishop Beckman, who in turn, recommended the investment to Bishop Rhode and to other wealthy Catholics, and priests who were thus induced to buy the Archbishop's personal and diocese notes, with which money the archbishop actually later acquired 60% of the properties and "froze" the defendant Suetter out. As a matter of fact, the idea of the trust units was conceived by Phillips in order to assist Suetter to raise the money to buy the \$250,000.00 Link-Belt dredge. Phillips sent Suetter to a lawyer in Chicago who drew up the units; Phillips furnished the cut of the dredge displayed on the units; Phillips made a confidential report to the archbishop of a confidential, independent investigation; Phillips

pulled himself, his employers, the Link-Belt Co., and their employees out when he saw the archbishop involving church property in what was really Phillips' scheme and promotion.

With this record before it, the trial Court should have granted the motion for dismissal interposed by the defendant. We believe that we have abundantly pointed out to this Court that there was an entire failure of proof by the United States to substantiate the charges contained in the indictment. The conviction was based only on the charges contained in Counts Six and Seven of the indictment, and we have heretofore pointed out, from the testimony of the witness, Bishop Paul P. Rhode, that the investments made by him in units of the Suetter Placer Mines was based on information that he had received from others than the defendant, Suetter, namely, Archbishop Beckman and Father Bubacz. With this state of the record before it, this Court can well see that the charges of fraud against the defendant were not proved by the prosecution. On the contrary, the record conclusively shows, we believe, that the defendant, as well as the investors, believed that the mines were a legitimate enterprise and that the defendant had invested all of the money he obtained from the sale of the units and otherwise, and more, in the purchase of machinery and other expense in connection with the operation of the mine. There was an absolute failure of proof of any conversion, to his own use by the defendant, Suetter, of any of the money invested by any person.

In the absence of proof that the defendant had conceived some scheme or artifice to defraud there is no basis to substantiate the conviction. As heretofore pointed out in this brief, the entire basis of the charges against the defendant was a single allegation of a scheme to defraud. The verdict of the jury shows that they found no such scheme to defraud because of their acquittal of the defendant on counts One and Two, alleging the same scheme. That, coupled with facts that the alleged indictment letters and other means of interstate commerce were admitted to have been used by the defendant, can leave no doubt as to the inconsistency of the verdict. The further consideration that there was no evidence, and that all of the evidence offered by the United States, and objected to by the defendant, was admitted without segregation or designation, proves conclusively that the verdict of the jury was inconsistent as the convictions were based on precisely the same evidence as the counts upon which the defendant was acquitted.

We therefore respectfully submit that because of such errors in the trial Court this conviction should be set aside and the charges against the defendant dismissed, or the case should be reversed and remanded for a New Trial.

Respectfully submitted,

W. J. PRENDERGAST, JR.,

DAVID WEINSTEIN.

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No. 10300

In the United States
Circuit Court of Appeals
for the Ninth Circuit

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

**Upon Appeal from the United States District Court
for the District of Oregon.**

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PAUL R. GIBSON

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Textbooks Cited:

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IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10300

PHILLIP SUETTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

**Upon Appeal from the United States District Court
for the District of Oregon.**

STATEMENT OF THE CASE¹

Appellant, Phillip Suetter, was indicted (Counts 1 and 2) for using the United States mails in furtherance of a scheme to defraud (18 U.S.C., §338), and (Counts 3-7) by use of the mails and interstate commerce em-

(1) The statement of facts set forth in Appellant's Brief is inadequate and, in some respects, incorrect. It contains only selected portions of the evidence. Consequently, this counter-statement of the case is necessary. We refer to the Government's exhibits as GX.

playing said scheme in the sale of securities in violation of Section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. §77q(a)(1)).²

The jury found appellant guilty on Counts 3, 4, 6 and 7. He was acquitted on Counts 1, 2, and 5. Following motion for a new trial the court below dismissed Counts 3 and 4. The opinion of the trial judge appears at pp. 229-253 of the Record.³

Appellant was sentenced on Counts 6 and 7 to a concurrent penitentiary sentence of 21½ years (R. 45-47, 253).

(2) In Appellant's Brief and Notice of Appeal the section of the Securities Act charged in the Indictment is incorrectly cited as Section 77q(a)(2) Title 15, U.S.C.A. (R. 48, App. Br. 2)

(3) Although the dismissal of Counts 3 and 4 is not in issue on this appeal, we wish to make our position clear that we do not agree with the trial judge's conclusion that simply because Archbishop Beckman had been compelled by the appellant's fraudulent practices to take a more active part in the venture, the securities selling scheme had ended as to him prior to the mailings alleged in those counts. It is our view that there was ample evidence to support the jury's verdict that appellant continued his efforts to induce further investments by the Archbishop as well as the other persons to be defrauded (e.g. R. 223-224). Such attempts to sell investments constitute a sale of securities, as specifically defined by sections 2(1) and 2(3) of the Securities Act of 1933 (15 U.S.C. §77(b)).

STATUTES INVOLVED

The mail fraud statute, in pertinent part, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * shall be fined not more than \$1,000, or imprisoned not more than five years, or both.

Section 17(a)(1) of the Securities Act of 1933, provides:

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—(1) to employ any device, scheme, or artifice to defraud, * * *

Section 2(3) of that Act, in pertinent part, provides:

When used in this title, unless the context other-

wise requires—* * * (3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; * * *

THE INDICTMENT

The scheme to defraud is alleged, as is customary, in the first count of the indictment, and incorporated by reference in each of the six other counts. In substance, it alleges that from 1934 to 1941 appellant devised and employed a scheme to defraud a class of persons (including six named individuals) whom by false representations appellant would and did persuade to invest in certain gold mining claims located in Josephine County, Oregon, known as the Suetter Placer Mines.

Appellant would and did sell units under a trust agreement, which stated that appellant would hold and operate the claims as sole trustee for the benefit of purchasers, who would be paid their pro rata share; and that appellant would keep a true and accurate set of books, showing the income and disbursement of the trust. These statements in the trust agreement would be and were false, and together with numerous other misrepresentations would be and were employed to induce the persons to be defrauded to purchase the units, to lull them into a false

sense of security concerning their investments, to enable appellant to convert a large part of the investors' money and other property, and to cause the investors to retain their interests. These included false representations that appellant was the sole owner of the mines and had a clear and absolute title thereto; that certain persons had agreed to invest \$80,000 in the mines; that all money invested would be used to purchase mining machinery and to defray operating expenses; that the units were a safe, sound and conservative investment; that investors would never lose their investments; that engineers had tested the properties and submitted a favorable report; that the properties were proven; that production would be commenced by September or November, 1937; that he would commence shipping gold to the mint within ninety days after December 16, 1938; that investors would realize large returns of from one to three million dollars during the three years commencing September 30, 1938; that investments in the mines would pay dividends of 20% of \$100,000,000; that he had a great deal of practical experience in mining and had been financially successful; and that he had invested over \$50,000 of his own funds in the mines.

The two mail fraud counts (1 and 2) contain mailings in November, 1939, and December, 1940, to Bishop Rhode, one of the persons to be defrauded. Counts 3 and 4 charge securities fraud by use of mailings on May 28

and May 29, 1939, respectively, addressed to Archbishop Beckman, another of the persons to be defrauded. In Count 5 the jurisdictional factor is an interstate telegram in September, 1940 to Father Bubacz, also one of the persons to be defrauded.

Counts 6 and 7, upon which the judgment rests, charge securities fraud and allege mailings from and to Bishop Rhode in July and August, 1939, respectively.

THE FACTS

In June, 1934, the appellant, Phillip Suetter, a bankrupt horsetrader, acquired for \$5400.00 in cash, certain placer mining claims in Josephine County, Oregon (Record 60, 91, 203). Funds for the acquisition of this property were obtained from Ralph Montag of Portland, Oregon, who was induced by Suetter to advance over \$31,000 to finance the purchase of and to develop and operate said claims (R. 57, 75-79). Appellant gave Montag a half interest in the claims and in any production therefrom (R. 57-58, 83) and a \$10,000 note, secured by a mortgage on the claims (R. 62). The note was never paid and the mortgage was never satisfied (R. 62). In spite of these facts, appellant represented to investors that he owned

the claims free and clear, no mention being made of Montag's interests (R. 6, 127-128, 165-168, 178).⁴

The fraudulent character of appellant's assurances of the imminence of profitable production appears clearly from his constant stringing along of investors, and the repetition of such statements over a period of years without any justification or basis in fact. As early as June, 1934, shortly after purchasing the claims, Suetter wrote: "We have spent \$7,610 for equipment * * * Everything is now on the property * * * We should be in production now * * *" (GX-3). A few months later, while asking for more money, Suetter wrote Montag, "My intention is to get every dollar of our money out 60 days from start.

(4) The details regarding the purchase of these claims and Montag's interests are as follows: In February, 1934, Suetter obtained an option to purchase these mining claims for \$8,000. Before the option was exercised Montag advanced funds to Suetter, for which he received his half interest (R. 57-58, 83; GX1, GX2). On June 23, 1934, Montag borrowed \$7500, which was turned over to Suetter, who then paid \$5400, the reduced cash price of the mining claims covered by the option (R. 60-61, 91, and GX3). On June 29, 1934, Suetter executed the note and mortgage mentioned (R. 62, GX-6). Montag's total investment was \$31,699.24, which included advances made and bills paid directly from February, 1934, until November, 1936 (R. 75-77, GX-16).

We start last of next week" (R. 65-66).⁵ Successful operation did not materialize (R. 78). When, in the spring of 1935, Montag refused to meet part of a payroll, appellant was moved to write him: "Not having any clean up does not condemn the property or me either." (R. 77, 78; GX-17). Montag testified that he "expected a clean up" in the 1934-1935 season but that insofar as he knew there never had been "a clean up" on the properties (R. 61).

In the spring of 1935, Robert H. Strong, a real estate man in Portland, Oregon, made a trip to the mining claims on behalf of some clients in the East, and wrote a factual report for them after first having obtained an option on the claims from Suetter. Strong testified that he was not, and did not purport to be, a mining engineer, and that his survey did not purport to be a mining engineer's report; that his report was intended to be used by, and examined by, persons conversant with mines and mining, and was not intended to be used as a basis for the sale of mines or stock to the public. He further testified that the option he obtained was never exercised (R. 194-195). Apparently this report was the basis for Suetter's representations to an investor that experts in mining

(5) Similar misrepresentations appear throughout the course of the scheme, as will be noted, *infra*. See for example a statement in August, 1939: "This will result in quick returns" (R. 37, 131).

had been consulted and that they had agreed that there were values in this property not yet touched (R. 128). Suetter admitted in 1941, in a deposition, that he never did employ engineers to examine and test the property (R. 120).

In the latter part of 1935 when Montag refused to advance additional funds for the development of the property (R. 69, 87; GX-12), Suetter sent one Ed Hogan to the Middle West to raise additional funds on a commission basis (GX-7; R. 64, 65). For his services Hogan was also to receive a five per cent interest in the property (R. 207). Suetter testified that he supplied Hogan with an automobile and expense money for the trip East (R. 207).

Hogan obtained money from Stephen A. Bubacz, a Catholic priest of Chicago, Illinois, and \$2,000 from Francis J. Beckman, Catholic Archbishop of Dubuque, Iowa (R. 121, 166). In July, 1936, appellant went to Chicago to confer with Hogan (R. 64-65) and to see some Catholic clergymen "he (appellant) had interested * * * in buying an interest in the property" (R. 83). Appellant told Hogan "how it's got to be done" (R. 214). Upon arriving in Chicago, appellant wrote Montag for expense money to assist in putting over a "deal" with the "fathers." Appellant described the deal variously. He said in August and September, 1936:

"* * * E. H. has proven to me that \$10,000.00

would not make the set that they would expect to see. Their first money will be \$25,000.00 or better. As soon as this first money is turned over to us I am leaving for the mine and E. H. will stay gathering more money until I get the outfit ready for him to leave. I will wire. By that time be plenty of water. They can't stay only four five days. I've got to have things ready and in shape when they arrive at the mine." (R. 65; GX-8)

"The total amount is \$329,000 for 49% of the property's output". (R. 212)

"* * * three Bishops and one or two of the other want to take up the whole proposition, and it looks very much they may turn all of said moneys, or at least \$100,000 * * *" (R. 214)

To create an appearance of an elaborately equipped project appellant entered into negotiations with William E. Phillips, sales manager of Link-Belt Company, looking toward the purchase of a \$250,000 dredge (R. 92). This money was to be derived from the sale of the units (R. 93).

Appellant represented to Phillips that he was "properly financed", and gave the company a cash deposit of \$5,000 on the purchase of a \$27,000 dragline (R. 108) to be used preliminarily to the dredge (R. 113). Appellant submitted gravel to Phillips for testing the extent and value of the recovery (R. 108). It was also represented by appellant that, apart from the machinery to be pur-

chased, the mines were fully equipped. This statement was untrue, as Phillips later learned (R. 116-117). Appellant did not want Phillips or anyone else to see the property until he, Suetter, could "go to Camp fix things up in good shape then wire Gilmore or Hogan to bring them * * *" (R. 215; GX-114), for one of the purposes in making the misstatements was to sell Phillips and Link-Belt Company employees interests in the mining claims (R. 217, 218).

Units were to be sold for \$1,000 each under trust agreements wherein appellant would agree to hold title to the mines for the benefit of those investing in the units (R. 72-74, 210). Phillips gave his \$1,000 note for one unit and later received a certificate for five units from appellant without further payment (R. 97, 116). Additional units were sold to other Link-Belt employees (R. 98).

Although Link-Belt Company cancelled appellant's order for the dragline (R. 108), Phillips continued to help appellant raise enough money from the Catholic clergymen in the hope that appellant might buy the machinery. He praised the property, and played up the value of the dredge (R. 112).

Appellant obtained from him a picture of the \$250,000 dredge (R. 96), which was then printed on the face of

the unit certificate (R. 97), although it was doubtful, to say the least, whether appellant would ever acquire the dredge.

Appellant falsely represented that the property had been properly tested (R. 165). After a meeting in the Stevens Hotel in Chicago in 1936 attended by Archbishop Beckman, one of the investors, appellant told Phillips that the latter should not have brought up the question of testing the property (R. 117). Appellant said it had been tested. Phillips told appellant the testing was not satisfactory.

In 1938, after a trip to the mining property in Oregon, Phillips demanded and obtained from appellant the return of his note and the money invested by the other Link-Belt employees, because Suetter "hadn't started work up there, no machinery was on the job," and "because the property had not been developed" (R. 116-117). In addition, Phillips testified that no proper testing had been done, no one seemed to be in charge of the property, and that he had never received any accounting (R. 99, 100, 107, 117). However, appellant's explanation to Archbishop Beckman was that he was going to return the money to the Link-Belt group because he was "dissatisfied with the Link-Belt Company" (R. 184).

Archbishop Beckman first met Suetter in 1936 at the

Stevens Hotel meeting. At that meeting Suetter described his mining property in Southern Oregon, and falsely stated that he was the sole owner and had clear title to the property. Archbishop Beckman had already heard about the property from Ed Hogan, Suetter's representative, who had offered to assist the Archbishop in financing the building of a seminary by having him invest in Suetter Placer Mines (R. 165, 166). After talking with Hogan, Archbishop Beckman paid him \$2,000 for two units of Suetter Placer Mines. These two units and the trust agreement were later delivered to the Archbishop by Suetter, who denied that Hogan was the owner of the property, but asserted that he, Suetter, was the owner (R. 166). By additional misrepresentations Suetter induced the Archbishop to invest in a considerable number of units paid for by cash and with funds obtained from Suetter's sale of the Archbishop's promissory notes (GX-82; R. 173). Appellant falsely represented that there was nothing in the country like the property (R. 182); that there was enough good ore "to keep us running for 30 years" (R. 27, 178; GX-89); and "you are setting with one hundred million dollars in your lap" (R. 24, 178; GX-88). While representing to Archbishop Beckman that his investment would be used for the purchase of machinery (R. 173) appellant was writing that the money would be used to repay appellant and Montag "for what we have put in it" (R. 212; GX-113).

In an agreement in March, 1938, supplemental to the trust agreement (R. 167-170), appellant falsely represented that he owned "clear title" to the mining properties, that "approximately ninety-five thousand dollars have been invested by Phillip Suetter * * * from his own estate and from his personal sources of income," and that he would furnish Archbishop Beckman itemized statements, inventories and accounts. In disregard of previous trust agreements executed with other purchasers of the units, who had been promised reimbursement of their investments before distribution of income should be made on any of the units, Suetter further agreed and represented that—

"* * * all net proceeds from the operation of the said Suetter Placer Mines in Josephine County, Oregon, shall be remitted by Phillip Suetter, undersigned herewith, to Archbishop Francis J. L. Beckman at Dubuque, Iowa—after deducting the costs of labor and actual operating expenses in connection therewith—until all outstanding Promissory Notes, issued on this mining project and given to Phillip Suetter by Archbishop Francis J. L. Beckman are fully paid with interest accrued to date of such redemption."

At about this time Archbishop Beckman learned that Montag had an "interest" in the property. He did not know, however, that Montag's interest included one-half of the mines and income therefrom, that Hogan had an interest in the mines, and that appellant had previously

promised Montag that he would repay him for his advances out of moneys received from Archbishop Beckman. He was only told by appellant that Montag's share came out of appellant's interest (R. 187).

By May 14, 1938, Archbishop Beckman had invested \$59,000 in cash and had issued to appellant promissory notes in the aggregate amount of \$253,750, of which appellant had sold \$125,000 (R. 173; GX-82).

Later, Archbishop Beckman borrowed \$40,000 from the bank at the insistence of Suetter, who said that this was "all he needed" and that "he would never bother him for another cent, that the \$40,000 was needed to put up a mill, and that the mill would certainly produce" (R. 172). In February, 1939, Archbishop Beckman discovered there was no mill, and that the Suetter Placer Mines were "operating but without much result" (R. 172-173).

When Archbishop Beckman learned that Suetter was putting money into other mining ventures (R. 173) he complained and insisted upon Suetter's giving him a 60% interest in all of the various properties (R. 174). Archbishop Beckman testified that when he took Suetter to task for not confining his operations to the Suetter Placer Mines, Suetter made the startling admission—"The Josephine is no good. There are too many boulders. You can't work the Josephine." (R. 174-75).

In March, 1938, without disclosure to any of the investors, Suetter purchased a gold washing plant for over \$40,000 to be used on one of his California mining ventures. Most of this amount was paid by checks drawn by Suetter on the Suetter Placer Mines account. About a year later, Suetter sold the plant for \$22,500 for which he never accounted (R. 87-91, 202, 224; GX-25). When selling this plant Suetter made an affidavit that he was its sole and exclusive owner (R. 90; GX-23).

With respect to one of these ventures, appellant wrote Archbishop Beckman in May, 1938 (R. 181):

"I think it would be well for you to give this a good thought and let me come back to Chicago and sell \$125,000 worth of these notes in three weeks or less. *You could take this money out of the property within ten months or less* and you would still have five to six years' work on this property with the outfit that is working there now * * * *It will be quick money right now.*" (Emphasis added.)

By March, 1939, the total investment of Archbishop Beckman was over \$277,000, exclusive of certain notes which were later cancelled and returned to him (R. 172, 173, 177, 193). After the Archbishop had finally threatened legal action to obtain an accounting, appellant in March, 1939, hired I. R. Perry, an accountant (R. 195). The accounting was never completed. A preliminary trial balance was made as of April 30, 1939. It was submitted

August 1, 1941, and was based on a build-up from checks, bank statements and information from appellant (R. 199). The trial balance disclosed an investment account of over \$281,000 and about \$20,000 of deposits in two Indiana banks (R. 196-97). These sums did not include the moneys obtained from Montag. The expenditures supported by cancelled checks totaled about \$228,000. This included nearly \$41,000 in checks written to cash or to appellant, which the accountant described as "personal withdrawals from the Bank" (R. 196, 201) and also included \$2,250 in checks to Suetter's wife (R. 201).

In May, 1939, appellant was still seeking additional funds from the Archbishop, appellant was still misrepresenting (R. 19-24, 26-29, 223-24), and the scheme rolled on.

In June, 1939, Archbishop Beckman instituted suit against Suetter for an accounting, and obtained an injunction forbidding Suetter to operate any of the properties. The suit was settled under an agreement whereby the unsold portion of the Archbishop's notes were returned to him, and Suetter deeded to the Archbishop all of Suetter's mining properties in California and Oregon except the claims of Suetter Placer Mines Trust in Josephine County, Oregon. Archbishop Beckman agreed to pay Suetter \$20,000 cash and to assume the claims of two other Catholic clergymen, Father Bubacz and Bishop Rhode, on

account of their investments in Suetter Placer Mines (R. 194).

Father Bubacz had invested through Hogan and received his units and trust agreements from appellant (R. 121, 131). This trust agreement contained misrepresentations, as noted above. As late as September 29, 1940, Suetter sought to obtain additional funds from him. Father Bubacz stated that this was in connection with Suetter's settlement with Archbishop Beckman. Appellant's telegram stated (R. 31-32, 122; GX-53):

"Have Spent Six Thousand to Date Your Sure Not Going to Let These Birds Take Forty Thousand Worth of Machinery for the Amount They Claim Better Fly Out Save it Wire Western Union Satisfied Five or Less Will Do Job—"

Bishop Rhode met appellant in March, 1937, through Father Bubacz (R. 122). Suetter called at Bishop Rhode's residence and told him that he had a specially fine project of placer mining in Josephine County, Oregon; that he had come to interest Bishop Rhode in the matter and to find out whether he would purchase shares or units in the venture, and, as a basis of the investment, he presented an agreement of trust between Suetter, the owner, and the prospective purchasers. Bishop Rhode had already seen a copy of such agreement at the home of Father Bubacz, but he again read the trust agreement "article for article,"

and after consideration, came to the conclusion that it was a "satisfactory document" (R. 127).

Appellant also represented that "with capital and a purchase of machinery and with work at a depth considerable recovery could be had." The amount of the recovery was predicted to be "either twenty or fifty million, something like that" (R. 128).

Although appellant "never did employ engineers to sample and test the property" (R. 120), and the survey and report made by Strong did not purport to be the work of a mining engineer, or to furnish a basis for selling stock to the public (R. 194-95), appellant nevertheless represented to Bishop Rhode that "miners and experts in mining had been consulted" and "they agreed that there were value there that had not as yet been touched" (R. 128).

When Bishop Rhode asked appellant whether he had a "clear and legal title to the property" appellant replied that he did, without disclosing Montag's interest in and mortgage on the claims (R. 129-30). Appellant further represented to Bishop Rhode that "there was gold practically everywhere where you would throw a pickaxe." (R. 137)

Relying upon all of the aforementioned representations as to the ownership and value of the property (R. 127),

and in particular reliance upon the statements made in the trust agreement furnished him, Bishop Rhode, between 1937 and the Fall of 1939 purchased 30 units for which he paid Suetter \$30,000 (R. 130, 138) and loaned Archbishop Beckman \$10,000 for the latter to invest with Suetter (R. 151).

In his dealings with Bishop Rhode over this period Suetter repeatedly represented that he was almost ready to go into production. Thus, in July, 1937, he wrote, "The drag line is on the grounds, truck and drill will be started this week" (R. 126; GX-67); and six months later wrote, "everything is going fine at the property. Had little delay about getting in fuel oil but that is all overcome now so I expect they will be in operation by the time I get home * * *" At that time he had another excuse: the stock market drop (R. 124; GX-57).

After Archbishop Beckman settled his suit, Bishop Rhode was again asked by appellant to purchase additional units and on July 27, 1939, sent appellant \$2,000 "to apply on the Josephine mine." In this letter, which is set forth in Count 6 of the indictment, Bishop Rhode asked appellant to confine his efforts to the Suetter Placer Mines and to "adhere strictly to the terms of our trust agreement" (R. 33-34, 130; GX-68).

As late as August, 1939, after the institution of Arch-

bishop Beckman's suit, appellant continued his attempts to induce Bishop Rhode to invest in his mining project. In a letter which is set forth in Count 7 of the indictment (R. 36-37, 131; GX-69) appellant wrote to Bishop Rhode with respect to the Josephine property:

"There will be considerable expense connected with getting the property back in operation and in as much as it is up to you and myself to carry the load. I would appreciate another \$5,000 to purchase the equipment. I will carry the payroll. *This will result in quick returns.*

"Will appreciate an early and favorable reply as I am very anxious to get the property in operation." (Emphasis added.)

Earlier appellant had been forced to admit to Archbishop Beckman that these mines were unworkable (R. 174-75). This was after Archbishop Beckman had learned that Suetter was putting investors' funds into another property (R. 174).

Appellant's fraudulent purpose also is evinced in one of his letters to Montag where appellant deplored the fact that the equipment was not set up "just to show them in a hurry gold is there" (R. 217).

In February, 1940, having received no return on or accounting for his investment, Bishop Rhode filed suit against appellant to recover the \$30,000 he had paid (R.

156-65, 182, 220). In a deposition in that suit appellant admitted that he had used \$3,000 of the Bishop's money, without disclosure, to develop one of his California mines (R. 164). He admitted diverting even more than this sum when questioned by one of the jurors during the trial of the present case (R. 227). Ninety thousand dollars in all went into the California properties (R. 163). Appellant sent a telegram to Archbishop Beckman threatening to make the Archbishop a party to the Rhode litigation, with attendant notoriety, unless he immediately caused the suit to be dismissed (R. 182). Shortly thereafter, Bishop Rhode withdrew the suit upon the urging of Archbishop Beckman, who pledged that he would take care of Bishop Rhode's investment (R. 157).

POINTS AND AUTHORITIES

I

**The Government Was Not Required To Designate To
Which Count or Counts In the Indictment
Particular Evidence Was Directed.**

Jarvis v. U. S., 90 F. (2d) 243, 244-45 (C.C.A. 1, 1937)

Coplin v. U. S., 88 F. (2d) 652, 668 (C.C.A. 9, 1937)

Schonfeld v. U. S., 277 Fed. 934, 937 (C.C.A. 2, 1921)

Moffatt v. U. S., 232 Fed. 522, 534 (C.C.A. 8, 1916)

Southern Pacific Co. v. Schoer, 114 Fed. 466, 472 (C.C.A. 8, 1902)

1 Wigmore, Evidence (3rd Ed., 1940) §13

Tenenbaum v. U. S., 11 F. (2d) 927, 929 (C.C.A. 5, 1926)

Hartzell v. U. S., 72 F. (2d) 569, 584 (C.C.A. 8, 1934)

Hendrey v. U. S., 233 Fed. 5, 13 (C.C.A. 6, 1916)

II

**There Is No Inconsistency In the Verdict; Even If
There Were, It Would Not Be Reversible Error.**

Dunn v. U. S., 284 U. S. 390, 393

Macklin v. U. S., 79 F. (2d) 756, 758 (C.C.A. 9,
1935)

Coplin v. U. S., 88 F. (2d) 652, 661 (C.C.A. 9,
1937)

Muench v. U. S., 96 F. (2d) 332, 336 (C.C.A. 8,
1938)

Sieden v. U. S., 16 F. (2d) 197, 198 (C.C.A. 2,
1926)

III

**The Jury's Verdict of Guilty On Counts 6 and 7 of the
Indictment Was Fully Supported By
the Evidence.**

Hemphill v. U. S., 120 F. (2d) 115, 117 (C.C.A.
9, 1941)

Holmes v. U. S., 134 F. (2d) 125, 130, 133 (C.C.A.
8, 1943)

Simons v. U. S., 119 F. (2d) 539, 549 (C.C.A. 9,
1941)

ARGUMENT

I

**The Government Was Not Required To Designate To
Which Count or Counts In the Indictment
Particular Evidence Was Directed.**

Appellant objected to the introduction in evidence of twenty-two of the Government's exhibits on the ground that "the Government should be compelled to elect as to which count or counts in the indictment said evidence was directed."⁶ The cases of *Jarvis v. U. S.*, 90 F. (2d) 243, 244-45 (C.C.A. 1, 1937) and *Coplin v. U. S.*, 88 F. (2d) 652, 668 (C.C.A. 9, 1937) do not support the proposition thus urged by appellant (App. Br. 25) but hold, in accordance with the general rule, that where the defendant

(6) The printed record discloses that this objection was raised only against the introduction of Government's Exhibits 1-3, 7-17, 36-38, 40, 42, 57, 67 and 79. Contrary to defendant's statement (App. Br. 30-31, 38; 18), this objection was not directed against the Government's evidence generally nor even against Government's Exhibits 4, 5, 6 and 19.

Defendant's assignment of error relating to the admission of these exhibits does not comply with Rule 2(b) of the Rules of this Court governing criminal appeals since defendant does not quote the grounds urged at the trial for the objection and exception taken nor does he quote the full substance of the evidence admitted. See *Waggoner v. U. S.*, 113 F. (2d) 867, 868 (C.C.A. 9, 1940).

deems certain evidence, which has been offered generally, incompetent to establish a particular count of an indictment his remedy is to ask the court to instruct the jury to disregard such evidence in their consideration of that count. *Schonfeld v. U. S.*, 277 Fed. 934, 937 (C.C.A. 2, 1921); *Moffatt v. U. S.*, 232 Fed. 522, 534 (C.C.A. 8, 1916); *Southern Pacific Co. v. Schoer*, 114 Fed. 466, 472 (C.C.A. 8, 1902). 1 Wigmore, Evidence (3d ed., 1940) §13. Appellant made no such request either at the time the exhibits in question were offered or at the time instructions were given to the jury; and no exception was taken to the instruction given by the trial court (R. 257).

In this case the trial judge properly permitted the government to introduce the exhibits in question without limitation. These exhibits comprised letters, checks and other documents bearing on the scheme to defraud which was incorporated in all of the counts. Certain of the exhibits showed, among other things, the nature and extent of Montag's interest in the mining claims. This proved the falsity of appellant's representations of sole and unencumbered ownership in appellant, which was part of the scheme to defraud. These misrepresentations were made to a number of the persons to be defrauded (including Bishop Rhode).

Other of the exhibits showed appellant's promises and representations to Montag, Phillips, Archbishop Beckman,

Father Bubacz and Bishop Rhode all of which were proven to have been made by appellant as part of his scheme to defraud. It is well established that in proving a fraudulent scheme great latitude is to be allowed in the proof of attendant circumstances; and that evidence tending to establish its existence may be extensive in scope. *Tenenbaum v. U. S.*, 11 F. (2d) 927, 929 (C.C.A. 5, 1926); *Hartzell v. U. S.*, 72 F. (2d) 569, 584 (C.C.A. 8, 1934); *Hendrey v. U. S.*, 233 Fed. 5, 13 (C.C.A. 6, 1916).

II

There Is No Inconsistency In the Verdict; Even If There Were, It Would Not Be Reversible Error⁷

Appellant admits that inconsistency in a verdict furnishes no ground for reversal. *Dunn v. U. S.*, 284 U. S. 390, 393; *Macklin v. U. S.*, 79 F. (2d) 756, 758 (C.C.A. 9, 1935); *Coplin v. U. S.*, 88 F. (2d) 652, 661 (C.C.A. 9, 1937). He contends, however, that the facts in this case come within a purported exception to the rule, in that all of the counts in the indictment were based upon the same

(7) Since this point was raised for the first time on motion for a new trial which was denied, there is considerable doubt whether the question is preserved on appeal. *Roubay v. United States*, 115 F. (2d) 49, 50 (C.C.A. 9, 1940).

scheme to defraud and, as appellant erroneously asserts, the government introduced precisely the same evidence to prove all of the charges.

Appellant was acquitted on Counts 1, 2 and 5, and the verdict of guilty on Counts 3 and 4 was set aside by the trial court. Appellant's contention rests on the purported inconsistency between the verdict of not guilty on Counts 1 and 2 and the guilty verdict on Counts 6 and 7. Counts 1 and 2 allege two distinct mailings to Bishop Rhode for the purpose of executing the scheme to defraud in contravention of the mail fraud statute. Counts 6 and 7 set forth different mailings in the sale of units of Suetter Placer Mines to Bishop Rhode in violation of Section 17(a)(1) of the Securities Act. Although each count involved the same scheme to defraud, the counts in question did have other elements which were different, and the evidence, properly offered without limitation to establish the existence of the scheme to defraud, may well have had greater or less probative value to establish other components of the two offenses. Thus, although appellant admitted that he had sent the letters and used the other means of interstate commerce charged in the indictment (R. 203; App. Br. 29), the jury could have concluded that the particular letters in Counts 1 and 2 were not "for the purpose of executing" the scheme to defraud (see *Muench v. U. S.*, 96 F. (2d) 332, 336 (C.C.A. 8, 1938)), at the

same time deciding that the mailings involved in Counts 6 and 7 were "in the sale of a security." As the District Court pointed out in denying the motion for a new trial (R. 251-52):

"* * * there is absolutely no inconsistency between the finding as to the Rhode letters in Counts One and Two and as to these (Counts Six and Seven) letters."

However, even if the evidence was exactly the same on all of the counts, the verdict of guilty on Counts 6 and 7 may not be set aside for inconsistency. In the *Dunn* case, *supra*, which establishes the rule conceded by defendant, Mr. Justice Holmes observed that "the evidence was the same for all the counts." And see *Sieden v. U. S.*, 16 F. (2d) 197, 198 (C.C.A. 2, 1926) where Circuit Judge Learned Hand declared:

"We have held that, when the jury convicts upon one count and acquits upon another, the conviction will stand, though there is no rational way to reconcile the two conflicting conclusions." (Quoted with approval in *Macklin v. U. S.*, 79 F. (2d) 756, 758 (C.C.A. 9, 1935).

III

**The Jury's Verdict of Guilty On Counts 6 and 7 of the
Indictment Was Fully Supported By
the Evidence.**

Appellant contends that there was insufficient evidence to sustain the verdict of guilty on Counts 6 and 7 (App. Br. 19-23, 31-38).⁸ Review on such an issue is confined to determining "whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." *Hemphill v. U. S.*, 120 F. (2d) 115, 117 (C.C.A. 9, 1941). As the Court declared in *Holmes v. U. S.*, 134 F. (2d) 125, 130 (C.C.A. 8, 1943):

"The jury having found defendant guilty we must assume that all conflicts in the evidence have been resolved in favor of the Government. It is not our province to pass on conflicts in evidence, credibility of witnesses, plausibility of explanations by defendant, nor the weight of the evidence. If there is substantial evidence viewed in a light most favorable to the Government to sustain the verdict, then it ought not to be set aside."

As the evidence heretofore set forth clearly shows, appellant's scheme was created for the purpose of de-

(8) Appellant did not renew his motion for a directed verdict at the end of the case.

frauding various persons who could be persuaded to invest in units of, or interests in, the Suetter Placer Mines. To induce investors to turn over money and property to him in reliance upon his promises, appellant falsely represented to them that he had sole and unencumbered ownership of a "specially fine" mine on which "there was gold practically everywhere where you would throw a pick-axe"; that "miners and experts in mining had been consulted and * * * agreed that there were values there that had not as yet been touched"; that the property had been properly tested; and that "from twenty to fifty million could be recovered" from the mines.

To lull investors into a false sense of security, appellant repeatedly tendered specious excuses for the failure to produce, and continually promised tremendous returns with no justification or basis therefor. To the contrary, the meagre results, if any, that were achieved over so many years, show quite clearly that appellant fully realized the fraudulent character of his statements.

Upon the basis of these fraudulent representations, investors were duped into investing hundreds of thousands of dollars in the units and interests in the mining claims. Moreover, appellant played fast and loose even with the small prospects, if any, that the investors had. When compelled to, he made commitments with respect to the income of the trust to Montag, Hogan and later Archbishop

Beckman which were wholly inconsistent with the interests of the other investors. Machinery or no machinery, as he much later confessed to the Archbishop, the claims could not be worked. Appellant did not even have the sole and unencumbered ownership of the mines, as he consistently represented.

First Montag was tapped for all he could yield by means of constantly reiterated statements that great production was just around the corner. When Montag would not give any more money on such representations, appellant induced him to continue his advances, for the "new" purpose of financing appellant in putting over the "deal" with the "fathers." This was to be no "penny anti game," but one for big money, from which, on the one hand, Montag was led to believe he would be able to recoup his advances, and on the other hand, the investors were promised the entire returns. To still Montag's wholly justified fear about the nature of the "deal," appellant assured him that "your name doesn't appear nowhere, only between ourselves."

The investors were presented with the rosy prospect of quick and easy returns based on great value—predictions and representations which appellant knew to be false and impossible of attainment.

To inspire their confidence, appellant represented that

he had many years of experience in successful mining ventures, and that he had a large personal financial investment in the Suetter Placer Mines. In fact, he had acquired the mines with money advanced by others shortly after going through bankruptcy, and had previously been a horse trader with but slight and desultory experience in gold mining.

Contrary to appellant's representations, and despite the investors' frequent requests, the money thus obtained by appellant was never accounted for, and was misapplied by appellant to finance his other ventures. Machinery purchased with investors' funds was secretly used in these other mines, and later sold for appellant's gain. In disregard of appellant's trust obligations, money advanced by one group of investors (the employees of Link-Belt Company) was repaid when they discovered his misrepresentations as to the condition of the mines. Other funds he withdrew for the use of himself and his wife.

The scheme to defraud thus perpetrated upon investors which began in 1934, when the claims were acquired, continued at least through all of 1939. In July, 1939, Bishop Rhode was induced to mail appellant \$2,000 to apply on the mine (the letter recited in Count 6 of the indictment). In August, 1939, despite his prior admission to Archbishop Beckman that the mine was "no good" and could not be worked, appellant used the mails (the letter

set forth in Count 7 of the indictment) in an endeavor to induce⁹ Bishop Rhode to purchase still more units to pay for equipment which, appellant represented, would "get the property back in production" and "will result in quick returns."

Contrary to assertions in appellant's brief, Bishop Rhode and the other investors did rely on appellant's representations in buying the securities issued by appellant; and it was not necessary to establish that every fraudulent misrepresentation alleged in the indictment was made to every investor, since the use of the mails was admitted and the scheme to defraud was established substantially as alleged. *Simons v. U. S.*, 119 F. (2d) 539, 549 (C.C.A. 9, 1941); *Holmes v. U. S.*, 134 F. (2d) 125, 133 (C.C.A. 8, 1943).

(9) An attempt to sell is expressly defined as a sale in Section 2(3) of the Securities Act of 1933.

CONCLUSION

The overwhelming weight of the evidence, substantially undisputed at the trial, showed a scheme to defraud carried on over a period of years in the sale of securities by use of the mails and interstate commerce in clear violation of Section 17(a)(1) of the Securities Act.

Appellant had a fair trial. His contentions with respect to the "inconsistency" of the verdict and to the Government's introduction in evidence of certain exhibits are without merit.

The conviction should be affirmed.

Respectfully submitted,

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No. 10361

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILLCONE STEAMSHIP COMPANY, a corporation, SANTA
CRUZ OIL COMPANY, a corporation and ASSOCIATED
INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

ALBERT V. STEFFEN,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement of Case.

Albert V. Steffen, appellee herein, was employed by the Santa Cruz Oil Company, a California corporation, as a watchman on the Steamship Prentiss. The Steamship Prentiss was owned by the Santa Cruz Oil Company. Hillcone Steamship Company, was neither the owner of the Prentiss nor the employer of Steffen and had nothing to do with any of the matters involved in this action. No judgment was taken against said Hillcone Steamship Company and it is in the same position as if said action had been abandoned as to it. The Associated Indemnity Corporation was the insurance carrier for said Santa Cruz Oil Company. Said company owned the steamship Prentiss for about two and one-half years. She never

went to sea during that time and was not in service. Later she was sold to the Craig Shipyards at Long Beach, California and scrapped. She was purchased by the Santa Cruz Oil Company to be reconditioned and fixed up as a tender ship for the fishing reduction plants which were operating out of San Francisco off the Ferralone Islands. Steffen never performed any other job aboard the boat except as watchman. He lived on shore most of the time but he had a bunk and electric heater on the boat. The ship was tied up at the Craig Shipyards in Long Beach. Steffen claimed that he was injured in coming off the ship; that there was a ladder from the bow of the ship to a sort of pontoon that was connected with the dry dock and that when he was going down the ladder he fell and sustained injuries to his back. He claims to have fallen onto the pontoon which was afloat in the dry dock. There was a dispute in the evidence as to whether or not he actually fell and as to whether or not he actually received injuries. It was claimed by the insurance carrier and the employer that his condition was due to arthritis and natural causes and that he never sustained an accident.

Steffen filed a claim for compensation with the U. S. Employees Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act. Issue was joined and hearing was had before Hon. Warren A. Pillsbury, Deputy Commissioner. Evidence was introduced at said hearing which was continued from time to time and at the conclusion thereof the Deputy Commissioner found as follows:*

*In all cases italics are ours.

“That during the month of February, 1937 the claimant above named was in the employ of the employer above named, Santa Cruz Oil Company, at Long Beach, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Associated Indemnity Corporation:

“That claimant contends that about said time he sustained injured to his back by the slipping of a ladder extending from a pontoon to said ship, while he was leaving said ship in the course of his work;

“That at said time claimant was employed as a watchman or caretaker on board the S. S. Prentiss and had been so employed for more than two years. That said vessel did not go to sea or engage in commerce or navigation at any [87] time during said period. That there was no crew on board during said time. That said vessel had been purchased by the employer with the intention of reconditioning and remodeling her for service in connection with certain fish reduction plants but that the employer eventually sold said vessel without putting her into use in such or any capacity as a vessel. That at the time of said injury said vessel was indefinitely laid up. That claimant’s employment as said watchman and caretaker was not maritime in character.”

The Commissioner thereupon rejected said claim and held that claimant’s service at the time of his alleged injury was not maritime in character, and that claimant does not come within the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act.

The order rejecting claim and findings of the Deputy Commissioner are set forth at pages 85 and 86 of the Apostles on Appeal.

This Court has jurisdiction to entertain an appeal from a final judgment in an admiralty proceeding.

Statement of Pleadings and Facts.

Thereafter Steffen filed a libel in *personam* on the Admiralty side of the Court in the U. S. District Court for the Southern District of California, Central Division. [Apostles on Appeal, p. 2.] A joint answer was filed on behalf of the respondents Hillcone Steamship Company, a corporation, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation. [Apostles on Appeal, p. 11, *et seq.*] A separate answer was filed on behalf of respondent Warren A. Pillsbury, Deputy Commissioner. [Apostles on Appeal, p. 14, *et seq.*]

The issues framed by the pleadings were generally whether or not the Deputy Commissioner erred in finding that the employment of Steffen was not maritime in character and hence not subject to the Longshoremen's & Harbor Workers' Compensation Act, and erred in rejecting said claim of Steffen.

When the case came on for hearing in the District Court upon stipulation of counsel and order of court the cause was heard on the record as certified by the Commissioner. [Apostles on Appeal, p. 18.] Said record

contained the entire file of the proceedings including the testimony had before said Deputy Commissioner. [Apostles on Appeal, pp. 19 to 87, incl.] Briefs were filed in the District Court on behalf of the various litigants and after submission of the case the judge of the said District Court made his findings and in accordance therewith entered his decree as follows [Apostles on Appeal, pp. 102 to 104]:

“The above entitled action came on regularly to be heard on the 10th day of June, 1942, before the above entitled Court, the Honorable Harry A. Hollzer, Judge Presiding, without a jury, the libelant appearing by his attorneys, William P. Lord and Fontana & Goldstone, A. A. Goldstone of counsel, the respondents Hillcone Steamship Company, Santa Cruz Oil Company, and Associated Indemnity Corporation appearing by their attorney, Cyril S. Tipton and the respondent Warren A. Pillsbury, Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission, appearing by William Fleet Palmer, United States Attorney and Howard V. Calverley, Assistant United States Attorney, Howard A. Calverley of counsel; the parties hereto, through their respective counsel, having stipulated that the liability of the respondents be determined on the issue of whether or not the service or employment of the libelant, at the time he admittedly was injured, was maritime in character, and the cause having been submitted on the record as certified by the Deputy Commissioner and upon the stipulations, oral

arguments and briefs of counsel [104] and the court being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law,

“It Is Hereby Ordered, Adjudged and Decreed as Follows:

“That libelant is entitled to relief under the Long-shoremen’s and Harbor Workers’ Compensation Act.

“That this cause be remanded to the Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission for the sole purposes of fixing the compensation due to libelant, Albert V. Steffen, by respondents Santa Cruz Oil Company and Associated Indemnity Corporation, and each of them, and, if necessary to take additional testimony in relation to such compensation in order to determine the amount thereof, and to fix the compensation due attorneys for libelant for services rendered in this proceeding.

“It is further ordered that libelant recover from respondents Santa Cruz Oil Company and Associated Indemnity Corporation his costs herein expended, the same to be taxed by the clerk of this Court.

“Dated November 9, 1942.

“H. A. HOLLZER,

“U. S. District Judge.”

Thereafter the necessary steps were taken for this appeal.

Specification of Assigned Errors.

The assigned errors relied upon are the following: Numbers I to XV, inclusive, printed on pages 112, 113, and 114 of the Apostles on Appeal. (Some of these assignments are overlapping in character but we shall in our brief attempt to group them in the proper manner.)

Steffen's Employment Was Not Maritime in Character.

This case involves the correctness of a decision by the Commissioner under the *Longshoremen's and Harbor Workers' Compensation Act*, 44 Stat. at L. 1424, Chap. 209, 33 U. S. C. Sec. 901, *et seq.* The decision held that Steffen, the claimant could not recover in his proceedings before the Commissioner, because claimant's employment as a watchman and caretaker was not maritime in character.

The assignments of error relating to this phase of the case are as follows:

I.

"The Court erred in finding that the libelant, Albert V. Steffen, was entitled to a decree herein against respondents, Hillcone Steamship Company, a corporation, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation."

II.

"The Court erred in not directing that the libel of the libelant should be dismissed."

III.

“The Court erred in finding that the service or employment of Albert V. Steffen, the libelant, was maritime in character. [112.]”

VI.

“The Court erred in finding that libelant is entitled to relief under the Longshoremen’s and Harbor Workers’ Compensation Act.”

IX.

“The Court erred in directing the U. S. Employees Compensation Commission to fix the compensation due the attorneys for libelant for services rendered in this proceeding.”

X.

“The Court erred in directing that libelant recover from respondents, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation, his costs herein expended. [113.]”

XIV.

“The Court erred in finding that the U. S. Employees Compensation Commission has jurisdiction of said cause.”

XV.

“The Court erred in finding, making and entering its decree against respondents, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation, and each of them.” [Apostles on Appeal, pp. 112-113-114.]

The above named assignments of error are interrelated and all raise the main question in this proceeding, namely, whether or not Steffen was entitled to the benefits of the Longshoremen’s and Harbor Workers’ Compensation Act.

The same question is raised by the statement of points on appeal printed in the *Apostles on Appeal* at pages 120 to 121, as follows:

“1. The libelant was not engaged in a maritime employment.

“2. Since the employment of libelant was not maritime in character the U. S. Employees Compensation Commission has no authority nor jurisdiction to grant libelant relief.

“7. That the finding of the Commissioner that the employment of libelant and his occupation were not maritime in character, was supported by the evidence before him and was correct.

“8. That the District Court erred in directing that attorneys’ fees be allowed to attorneys for libelant.

“9. That the District Court erred in holding that the employment or occupation of libelant was maritime in character.”

The Employment of Steffen Was Not Maritime in Character and the Ruling of the Deputy Commissioner Was Correct.

See the following authorities on the proposition that a watchman on vessels not in service is not in a maritime occupation.

The Fortuna, 206 Fed. 573;

Gurney v. Crockett, Fed. Case No. 5874, 11 Fed. Cases 123;

The Sirius, 65 Fed. 226;

The Poznan, 9 Fed. (2d) 838;

The William Leishear, 21 Fed. (2d) 863.

Since the Alleged Claim of Steffen Arose From Contact and Not From Tort His Remedy Was Not Under the Admiralty Laws but Under the California Laws.

The alleged injuries arose by reason of contract and not by reason of tort. Steffen was employed to act as a watchman on the S. S. Prentiss which was at all times tied up to the dock. No negligence is claimed. He claims he fell off a ladder which went from the ship to a float attached to the dock while he was going to answer the telephone. Because of his contract of employment he claims recovery and not otherwise. His duties were to be a watchman on a vessel which was not going to sea nor being used by his employer for the doing of any maritime business. During all times of his employer's ownership the vessel was out of service. His alleged injuries were not received in the course of employment under a maritime contract or while the alleged injured servant was performing work of an essentially maritime character. We believe the *Puget Sound Nav. Co. v. Marshall*, 31 Fed. (2) 903 case comes within the doctrine of *Grant Smith-Porter Ship Company v. Rhode*, 257 U. S. 469, 66 L. ed. 321, 42 Sup. Ct. Rep. 157. That case holds that "*in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and, in matters of tort, upon the locality.*" The court says in speaking of the text of jurisdiction as follows:

"The general doctrine that, in contract matters, admiralty jurisdiction depends upon the nature of the transaction, and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled. Waring v. Clark, 5 How. 441, 459, 12 L. ed. 226, 235; Philadelphia,

W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co., 23 How. 209, 215, 16 L. ed. 433, 435; The Commerce (Commercial Transp. Co. v. Fitzhugh), 1 Black, 574, 579, 17 L. ed. 107, 109; The Plymouth (Hough v. Western Transp. Co.), 3 Wall. 20, 33, 18 L. ed. 125, 127; Leathers v. Blessing, 105 U. S. 626, 630, 26 L. ed. 1192, 1194; Martin v. West, 222 U. S. 191, 197, 56 L. ed. 159, 162, 36 L. R. A. (N. S.) 592, 32 Sup. Ct. Rep. 42. See Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59, 58 L. ed. 1208, 1211, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733, and Hughes, Admiralty, 2d ed. p. 195."

Under the ruling of the cited cases this was not an admiralty matter. We believe the action should not have been on the admiralty side of the court.

Steffen had a remedy under the California Workmen's Compensation Act. The alleged injuries occurred in California. The employer was a California corporation and (unless the proceeding is barred by the Federal law) was subject to the Workmen's Compensation Act of California.

Labor Code of the State of California, Sections 3201 to 6002, inclusive.

Sec. 21, Art. XX of the Constitution of the State of California authorizes the legislature to "create and enforce a liability on the part of all employers to compensate their employees for any injuries received by said employees in the course of their employment. Employers' Liability Assurance Corporation, etc. v. Industrial Accident Commission, 177 Cal. 775.

We, therefore, have a situation here where there was jurisdiction in the State court and where Steffen had a right to proceed against his employer under the Workmen's Compensation Statutes of California. The finding of the District Court "that recovery of such disability through Workmen's Compensation proceedings may not validly be provided by State law" [Apostles on Appeal, page 101] was erroneous. The District Court decided the case on the theory that such employment was of a maritime nature and therefore not subject to the state laws. The courts of the State of California have affirmed the ruling above quoted in *Grant Smith-Porter Ship Company v. Rhode, supra*. In the case of *Shipbuilding etc. Co. v. Industrial Accident Commission*, 57 Cal. App. 355, the court decides as follows:

"In determining whether a contract be maritime the test is, not locality, as in the case of torts, but the subject matter of the contract—the nature of the work to be done. (Doey v. Clarence P. Howland Co., 224 N. Y. 30 (120 N. E. 53).) 2. A contract for the construction of a vessel is nonmaritime and not within the admiralty jurisdiction. (Thames Towboat Co. v. Francis McDonald, 254 U. S. 242 (65 L. Ed. 245, 41 Sup. Ct. Rep. 65); Grant Smith-Porter Ship Co. v. Rhode, 257 U. S. 469 (66 L. Ed. 321, 42 Sup. Ct. Rep. 157).) Although the uncompleted vessel upon which he was hurt was lying in navigable waters, Toutain's services were not of a maritime nature. Neither his general employment nor his activities at the time had any direct relation to navigation or commerce. (Grant Smith-Porter Ship Co. v. Rhode, *supra*.)"

See also:

New Amsterdam Casualty Co. v. McMaugal, 87
Fed. (2d) 332;

Jones v. International Mercantile Marine Co., 277
N. Y. 640, 14 N. E. (2d) 198.

Assignment of error number V reads as follows:

“The Court erred in finding that recovery for disability through Workmen’s Compensation proceedings may not validly be provided by State Law.”
[Apostles on Appeal, page 112.]

Recovery Should Be Sought by Steffen Under State and Not Under Federal Laws.

The leading case on matters of this nature is *Southern Pacific Company v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, 37 Sup. Ct. Rep. 524. A comprehensive note as to the applicability of State Compensation Acts to injuries within admiralty jurisdiction appears in a note to 25 A. L. R. 1029. That note discusses the effect of the various state statutes prior to the decision in the *Jensen* case and subsequent thereto. In a very recent case, however, the U. S. Supreme Court, speaking through Justice Black, criticizes the *Jensen* decision and interprets it with reference to the Compensation Statutes of the State of Washington. The recent case is entitled *Davis v. Department of Labor and Industries of the State of Washington*, 87 L. ed. Adv. Ops. 175; 63 Sup. Ct. Rep. 225; U. S. Law Week 4059. (No. 86, decided December 14, 1942.)

Davis, a structural steel worker, was employed by a construction company, to work on a job which involved the dismantling of an abandoned drawbridge which crossed

a navigable river in the State of Washington. Part of that work involved the cutting away of the steel of the bridge with oxyacetylene torches and when loaded in barges cutting the steel again into suitable lengths for transportation. While engaged on this work he fell into the navigable stream and was drowned.

A Washington statute provides compensation for employees and their dependents if its application can be made "within the legislative jurisdiction of the state" and further provides coverage of the Act to "all employers or workmen . . . engaged in maritime occupations for whom no right or obligation exists under the maritime laws." A line of opinions of the Supreme Court beginning with *So. Pac. Co. v. Jensen*, 244 U. S. 205, 216, held that under some circumstances states could, but under others could not, consistent with Article III, par. 2 of the Federal Constitution, apply their compensation laws to maritime employees. State legislation was declared to be invalid when it works "material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." When a state could, and when it could not, grant protection under a compensation act, was left as a "perplexing problem".

To remove uncertainty so that workers whose duties were partly on land and partly on navigable waters might be compensated for injuries, Congress soon after the *Jensen* decision passed an act giving such injured persons "the rights and remedies under the Workmen's Compensation law of any state". That Act was declared unconstitutional. Congress made another effort to permit

state compensation laws to protect that class of employees but this second act was also held invalid. Then followed the Federal Longshoremen's and Harbor Worker's Act, 33 U. S. C. Sec. 901 *et seq.*, which made clear the purpose of Congress to permit state compensation protection whenever possible by making the federal law applicable only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by law."

Application was made by the decedent's widow under the state law. The Supreme Court of the State of Washington held that the state could not consistently with the Federal Constitution as construed in the *Jensen* case make an award under its state compensation law to the widow of a workman drowned in a navigable river.

Certiorari was allowed to review the decision of the State Supreme Court and the judgment of the State Court was reversed.

The opinion of the court was delivered by Mr. Justice Black. After reviewing the provisions of the state and federal statutes and the course of the case through the courts below, the opinion says:

"Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins

of state authority must 'be determined in view of the surrounding circumstances as cases arise.' . . . The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here."

As to the difficulties which these uncertainties impose on the employee, Mr. Justice Black says:

"It must be remembered that under the Jensen hypothesis, basic conditions are factual: Does the state law 'interfere with the proper harmony and uniformity of' maritime law? Yet employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere."

As to those likewise imposed on the employees, it is said:

"The horns of the jurisdictional dilemma press as sharply on employers as on employees. In the face of the cases referred to above the most competent counsel may be unable to predict on which side of the line particular employment will fall. The employer's contribution to a state insurance fund may therefore wholly fail to protect him against the liabilities for which it was specifically planned."

Stating the considerations which seem to suggest that the constitutional questions involved in the *Jensen* case should not now be re-examined, Mr. Justice Black says:

“We are not asked here to review and reconsider the constitutional implications of the *Jensen* line of decisions. On the contrary, even the petitioner argues that such action might bring about still worse confusion in an already uncertain field, and points out that state and federal agencies have made real progress toward closing the gap.

The Longshoremen's Act passed with specific reference to the *Jensen* rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. But the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side.

There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.

We find here a state statute which purports to cover these persons, and which indeed does cover them if the doubtful and difficult factual questions to which we have referred are decided on the side of the constitutional power of the state.

In making the factual judgment there, we have relied heavily on the presumption of constitutionality in favor of the state statute.”

Mr. Justice Black closes the statement of his final conclusion as follows:

“Not only does the state act in the instant case appear to cover this employee, aside from the constitutional consideration, but no conflicting process of administration is apparent. The federal authorities have taken no action under Longshoremen’s Act, and it does not appear that the employer has either made the special payments required or controverted payment in the manner prescribed in the Act. . . . Under all the circumstances of this case we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here any more than in the other cases cited.

Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the petitioner’s recovery. The case is remanded for proceedings not inconsistent with this opinion.”

(In a discussion of the above case we have used the review published and the language appearing in a recent issue of the American Bar Journal.)

In the case at bar the facts were determined by the Deputy Commissioner and such determination should be binding on the District Court.

Under the ruling of the *Davis* case and the finding of the Deputy Commissioner, we respectfully submit that the claimant Steffen should seek relief under the California statute and not under the Longshoremen’s Relief Act.

The District Court Should Have Limited Its Decision to a Determination of the Maritime Question. The Assignments of Error on that Argument Are as Follows:

IV.

“The Court erred in finding that Albert V. Steffen, libelant, sustained certain injuries while engaged in the performance of his duties as a watchman on the S. S. Prentiss.”

VII.

“The Court erred in remanding said cause for the sole purpose of fixing the compensation due to libelant, Albert V. Steffen, by respondents, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation, and each of them.”

VIII.

“The Court erred in directing that additional testimony be taken by the Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission for the sole purpose of fixing the Compensation due to libelant, Albert V. Steffen, in order to determine the amount thereof.”

XI.

“The Court erred in finding that libelant sustained an injury and that at the time of sustaining his injuries libelant was engaged in maritime employment upon navigable waters of the United States.”

XII.

“The Court erred in finding that at the time of sustaining said injuries libelant was engaged in the performance of the duties of such employment.”

XIII.

“The Court erred in finding that the present disability of libelant arose from injuries received in the course of his employment.”

All the above assignments of error question the right of the District Court to do more in its decree than decide the question of whether or not Steffen's employment was maritime in character. The same points are referred to in appellant's statement of points on appeal at page 120 of the Apostles on Appeal as follows:

"4. That the Commissioner did not find that libelant had been injured or that his alleged or claimed injuries were received in the course of his employment.

"5. That since the Commissioner made no finding as to whether libelant had been injured or whether his alleged or claimed injuries were sustained in the course of his employment the Court erred in directing that a hearing be had by the Commissioner on the sole issue of finding the amount of compensation due libelant.

"6. That if said employment of libelant shall be held to be maritime in character it is the duty of the Commission and not of the District Court to determine the fact of injury and whether or not such injury was incurred in the course of the employment." [Apostles on Appeal pages 112 and 113.]

As state in the statement of points on appeal herein:

"3. The power of the District Court was limited to the determination of whether or not the occupation of libelant was maritime in character.

"4. That the Commissioner did not find that libelant had been injured or that his alleged or claimed injuries were received in the course of his employment.

"5. That since the Commissioner made no finding as to whether libelant had been injured or

whether his alleged or claimed injuries were sustained in the course of his employment the Court erred in directing that a hearing be had by the Commissioner on the sole issue of finding the amount of compensation due libelant.

“6. That if said employment of libelant shall be held to be maritime in character it is the duty of the Commission and not of the District Court to determine the fact of injury and whether or not such injury was incurred in the course of the employment.” [Apostles on Appeal page 120.]

The finding of the Deputy Commissioner went no further than to decide on the evidence submitted to him that the employment of Steffen was not maritime in character and, therefore, he could not recover under the provisions of the Longshoremen's and Harbor Worker's Compensation Act. He made no *finding as to whether or not claimant was injured or as to whether or not claimant's injuries were received in the course of his employment*. The District Court in making its decision decreed:

“That this cause be remanded to the Deputy Commissioner, 13th Compensation District, U. S. Employees Compensation Commission for the sole purposes of fixing the compensation due to libelant, Albert V. Steffen, by respondents Santa Cruz Oil Company and Associated Indemnity Corporation, and each of them, and, if necessary to take additional testimony in relation to such compensation in order to determine the amount thereof, and to fix the compensation due attorneys for libelant for services rendered in this proceeding.

“It is further ordered that libelant recover from respondents Santa Cruz Oil Company and Associated Indemnity Corporation his costs herein expended, the same to be taxed by the clerk of this Court.”

In other words, the District Court by its decree made the implied finding that claimant was injured and that he was injured in the course of his employment. This becomes very prejudicial to appellants because it was claimed by them before the Commissioner that Steffen had not been injured; that his physical condition was due to arthritis and chronic ailments and not to any trauma or injuries received during the course of his employment. Those questions we respectfully submit were solely for the determination of the Commissioner. The power of the District Court was limited by the stipulation and by-law to the question of whether or not Steffen's employment was maritime in character and hence whether the provisions of the Longshoremen's and Harbor Worker's Compensation Act applied.

We believe it is well settled that the District Court in a proceeding of this nature cannot make findings of fact for the Commissioner and that if the matter was to be remanded it should have been remanded to the Commissioner for hearing upon the vital questions of whether or not claimant was actually injured and what was the nature and extent of his injuries. Since, therefore, the questions of fact should be determined by the Commissioner there was no power in the District Court to change findings or to make findings for the Commissioner.

Volhn v. Indemnity Insurance Co., 288 U. S. 162;

S. Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251.

The authority to determine facts was confided by Congress to the Deputy Commissioner.

See also:

Williams v. American Employers Ins. Co., 107
Fed (2d) 953. Certiorari denied, 309 U. S.
682;

Crowell v. Benson, 285 U. S. 22.

Conclusion.

We respectfully submit that the decision of the District Court should be reversed and the proceedings dismissed on the ground that the employment of Steffen was not maritime in nature. We further respectfully urge that in any event the decision of the District Court should be modified and that if the case is remanded to the Deputy Commissioner he should be permitted to hear the entire matter on evidence submitted before him and to make his own determination as to whether or not claimant was actually injured and as to whether or not such injuries were received by the claimant in the course of his employment as watchman.

We respectfully urge that the District Court exceeded its authority in attempting to make findings on said matters which were primarily for the determination of the Commissioner, and that the District Court in a proceeding of this nature has no power to find facts for the Commissioner.

The claim, if any, of Steffen comes squarely under the State Compensation Laws of California because his contract contemplated only duties as a watchman upon a vessel which was not being used at any time during his employment and which, in fact, never went to sea after the commencement of his employment and was finally scrapped. There was nothing whatsoever in the character of his duties which contemplated any maritime activity or any service aboard the vessel while it was in use.

Respectfully submitted,

S. S. TIPTON,

A. G. RITTER,

Attorneys for Appellant.

No. 10361.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HILLCONE STEAMSHIP COMPANY, a corporation, SANTA
CRUZ OIL COMPANY, a corporation, and ASSOCIATED
INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

ALBERT V. STEFFEN,

Appellee.

APPELLANTS' CLOSING BRIEF.

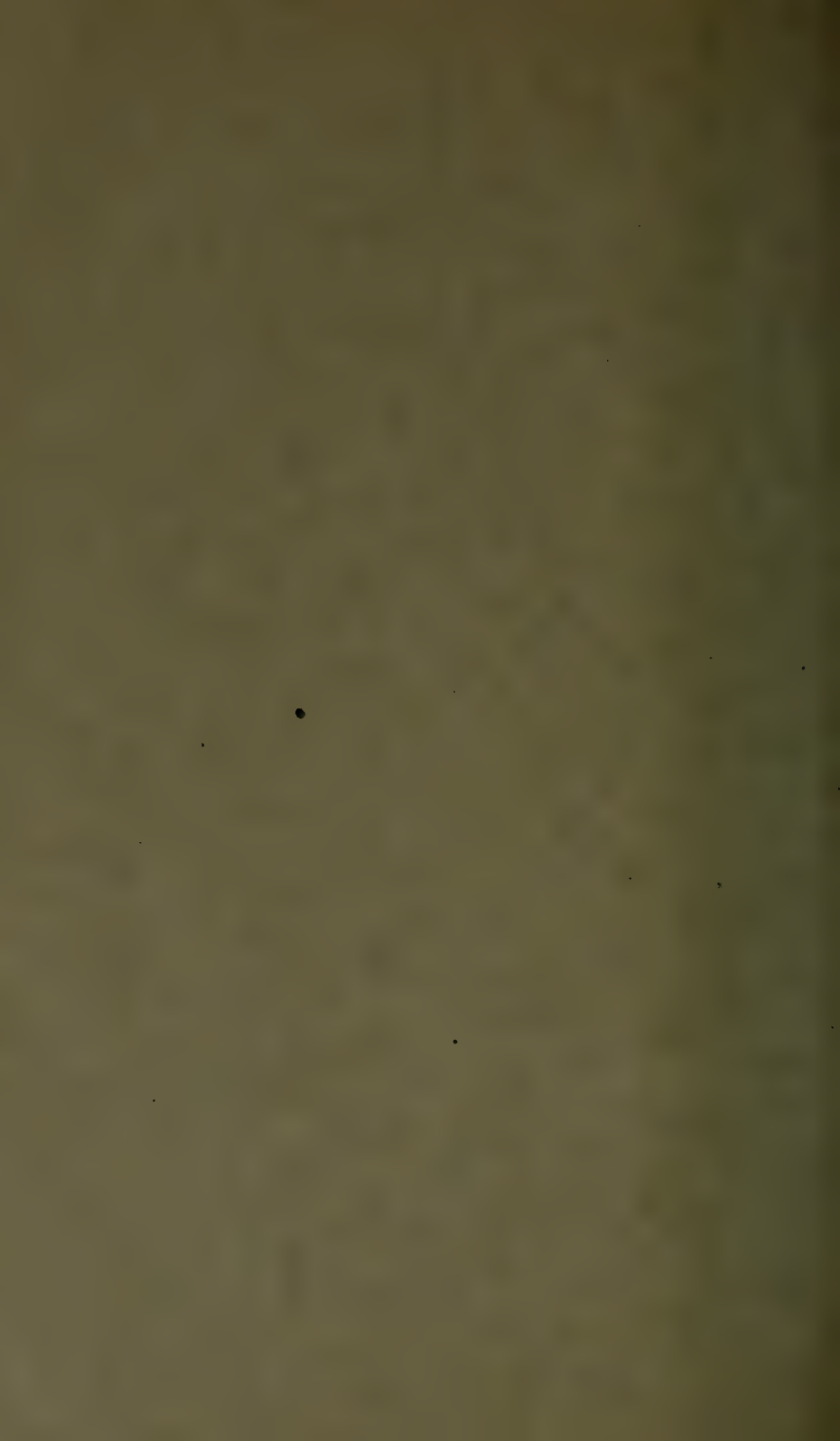
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IN THE

United States Circuit Court of Appeals
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INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

ALBERT V. STEFFEN,

Appellee.

APPELLANTS' CLOSING BRIEF.

The Question Before the Trial Court Was a Legal and
Not a Factual One.

There is no serious dispute between the parties as to the facts herein. A hearing was had before the Deputy Commissioner under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. He decided solely that he had no jurisdiction and refused to hear the proceedings further. Thereafter all the testimony and findings were certified to the trial court and upon that record and the pleadings it was submitted to the Trial Court upon briefs and as a question of law. According to the stipulation of counsel the question of law to be determined by the trial court was "Was the service or

employment of the libelant Albert V. Steffen as watchman on the S. S. Prentiss at the time of his injury maritime in character?"

If the trial court decided that question in the negative, there was an end of the matter. If it was decided in the affirmative, as it was, what was the effect of the decision? It is our contention that such question being decided in the affirmative, the sole power of the court was to send back the proceedings for further hearing before the Commissioner. Upon the questions which were peculiarly within the jurisdiction of the Commissioner, the trial court could not find facts for the Commissioner. The trial court was limited to deciding the question of law presented. The question presented to the trial court was only the legal one, upon which depended jurisdiction of the Commissioner. The court having decided that the Commissioner had jurisdiction under the Longshoremen's Act had no other alternative but to send the case back for determination by him of the basic facts of injury, the nature and extent of injuries and the amount of compensation to which the injured man was entitled, if any. It is not claimed by either party that the Commissioner has passed upon said facts. In truth, he expressly refused to do so and held that he had no jurisdiction. In the absence of any findings of facts by the Commissioner, it seems obvious to us that the trial court could not make findings for the Commissioner, but that the Commissioner should be directed to make his own findings in the manner governed by statute after a hearing before him.

We have in our opening brief cited authorities and discussed this phase of the case on pages 19 to 23, inclusive. We refer to it here because of the opening statement of case in appellee's reply brief.

The Longshoremen's and Harbor Workers' Act Was Enacted to Provide Compensation for Longshoremen and Harbor Workers Upon Navigable Waters When State Compensation Statutes Are Inapplicable.

As an initial proposition appellee states: "The purpose of the Longshoremen's and Harbor Workers' Compensation Act was to provide compensation to all those various sorts of longshoremen and harbor workers who were performing labor on a vessel." In support of such proposition appellee cites the case of *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 84 L. Ed. 732, at 736.

Appellee does not quote the entire language of Justice Hughes in setting forth the issues in the cited case. The court says:

"We think it clear that Congress in finally adopting the phrase * * * intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel *and to whom state compensation statutes were inapplicable*. The question is whether decedent, in this instance, fell within that class."

In other words, the holding of the court as stressed by our italics was that the statute was applicable to those longshoremen *to whom state compensation statutes were not applicable*.

We have heretofore attempted, in our opening brief, pages 10 to 18, inclusive, to show that the compensation laws of California did apply to Steffen and therefore he had a remedy in California and not one under the Longshoremen's Act. It is not contended by either side here that Steffen was a member of the crew. If he were a

member of the crew, he would be barred from compensation under the provisions of the Longshoremen's Act.

In *Crowell v. Benson*, 285 U. S. 22, also cited by appellee, the court again emphasizes that the Longshoremen's Act is applicable in maritime employment "*if recovery through workmen's compensation proceedings may not validly be provided by state law.*"

Steffen Was Not a Member of the Crew and His Claim, If Any, Is Based on Contract, Not on Tort.

In the *South Chicago* case cited by appellees, the decedent was an employee of the steamship company and was drowned while serving his employer as a laborer aboard the vessel. The case on its facts was a different one and it was properly held that the deceased was in a maritime occupation. In the case at bar it must be kept in mind that Steffen was a watchman at all times on a boat which was not used for maritime purposes at any time during the performance of his services. We again refer to our argument on pages 10 to 18, inclusive, of our opening brief, and respectfully maintain that "In contract matters admiralty jurisdiction depends upon the nature of the transaction and, in matters of tort, the locality." We refer again to the cases cited there by us. We believe that this case is not one within the admiralty jurisdiction of the court and that the action was improperly brought there. We believe that the action should have been in the nature of a writ to compel the Commissioner to take action and assume jurisdiction and that it was not proper to have the questions determined by an admiralty court as an admiralty proceeding *in personam*. No tort is claimed by appellees. Any rights of Steffen arose by reason of contract between Steffen and his em-

ployer to act as a watchman upon this boat which was not at any time during his employment used for maritime services. The fact that the boat was resting upon waters in a dock does not change the law that we have just cited and that has been pronounced repeatedly by the courts of the United States and California in cases such as *Grant Smith-Porter Ship Company v. Rhode*, 257 U. S. 469; in *Shipbuilding etc. Co. v. Industrial Accident Commission*, 57 Cal. App. 355, and other citations set forth in pages 10 to 13, inclusive, of our opening brief.

In the case of *Moore Drydock Company v. Pillsbury*, 100 Fed. (2d) 245, at 246, cited by appellee, the question was "whether decedent Howland at the time of his death was an employee under the act or excepted from the act as a member of a crew of any vessel." The Longshoremen's Act provided that no compensation shall be payable in respect of the disability or death of "a master *or a member of a crew of any vessel*." Howland was properly held in that case not to be a member of the crew. The question of whether or not he should have received compensation under the Workmen's Compensation Act of California was not raised. The boat was in use and went about San Francisco Bay and on inland waterways as far as Stockton. Decedent had been employed for several years as a rigger and aboard a launch for repairing boats. The facts and the questions of law in said case are entirely different from those in the case at bar.

Appellee's argument that since the injuries occurred on the navigable waters of the United States, it was not compensable under any state workers' compensation act is refuted by the recent decision of *Davis v. Department of Labor & Industries of the State of Washington*, 87 L. Ed., Adv. Ops. 175, which case is referred to by both parties herein.

Another case relied upon by appellee is the case of *Union Oil Company v. Pillsbury*, 63 Fed. (2d) 925. In that case the injured man was third officer and a member of the crew. He had no outside contract at the time of his injury. That case seems to us to hold that where a member of the crew is engaged in outside duties he may come within the provisions of the act. Those facts were entirely different from a case where an outsider who is not a seaman or a member of the crew, such as Steffen, who is hired to perform duties which are not maritime in character and where his injuries do not arise from tort of the employers and where he is primarily within the provisions of the State Act for the benefit of employees. The holding in the *Union Oil* case was on the question as to whether or not the injured man was a member of the crew. Nobody here claims that Steffen was a member of the crew of the *Prentiss*. If he were, he would be out under the provisions of the act. So in the case of *Seneca Washed Gravel Corporation v. McManigal*, 65 Fed. (2d) 779, the question determined was whether or not the deceased was a member of the crew and it was held that he was not.

Conclusion.

For convenience we have referred at times to Steffen as the injured man. It is not conceded that he ever was injured in the course of his employment. The Commissioner never determined that fact and it was the contention before him that Steffen's condition was due to natural causes and not to any injury. The trial court could not determine that matter. It was solely for the Commissioner if he had jurisdiction at all. If he had jurisdiction, which we do not concede, he should be directed to

proceed with the case and make his findings on the issues of fact before him, which includes the question of injury. The trial court can not do that for him in a proceeding such as this where the sole question presented was one of law. Steffen was never engaged in a maritime occupation. The vessel was at all times out of use. The fact that it was in the water did not under the ruling of the cited cases change the law that one whose duties were not maritime in character and where the obligation arose entirely from contract and not from tort, should proceed under the State Laws enacted for his benefit and not under the Federal Longshoremen's Act before the Commissioner. Admiralty jurisdiction was not present here. We respectfully submit that the decision of the trial court should be reversed.

S. S. TIPTON,

A. G. RITTER,

Attorneys for Appellants.

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No. 10361.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HILLCONE STEAMSHIP COMPANY, a corporation, SANTA
CRUZ OIL COMPANY, a corporation, and ASSOCIATED
INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

ALBERT V. STEFFEN,

Appellee.

APPELLANTS' SUPPLEMENTAL BRIEF.

At the time of the oral argument the Court directed that citations be furnished in connection with the jurisdictional question as to the right of claimant, Steffen, to proceed in the form of action which he had instituted in the District Court. Section 921 of the Longshoremen's and Harbor Workers Act provides an exclusive method whereby the proceedings of the commissioner may be reviewed. Said section reads as follows:

“Review of Compensation Orders. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings

for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in this District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which

the injury occurred (or to the district court of the United States for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter. Mar. 4, 1927, c. 509, §21, 44 Stat. 1436, as amended June 25, 1936, c. 804, 49 Stat. 1921.”

A special method is therefore set up by Congress in the act itself for the review of orders such as the one in the case at bar. It has been held by this court that the proceedings contemplated by the act are on the admiralty side of the court. See *Kobilkin v. Pillsbury*, C. C. A., Cal., 1939, 103 F. (2d) 667, certiorari granted, 1940, 60 S. Ct. 97, 308 U. S. 530, 84 L. Ed. 447, affirmed, 1940, 60 S. Ct. 465, 309 U. S. 619, 84 L. Ed. 983, rehearing denied, 1940, 60 S. Ct. 584, 309, U. S. 695, 84 L. Ed. 1035. See also *Twin Harbor Stevedoring & Tug Company v. Marshall*, 103 F. (2d) 513.

The two cases just cited were both decided by the United States Circuit Court of Appeals for the Ninth Circuit.

In the case at bar the action in the District Court after the hearing by the commissioner was commenced on the

admiralty side of the court as it should have been. Our contention is that the procedure followed was not that prescribed by the act, namely, the filing of a petition to obtain a mandatory injunction compelling the commissioner to proceed with the hearing as is set forth in paragraph (b) of said section 921. Petitioner does not ask for a mandatory injunction for that purpose unless it might be held that the general allegations of the prayer be so interpreted. As we view the so-called libel and complaint of Steffen, it constitutes a petition to the District Court to find the facts and weigh the testimony, and is not a proceeding asking for a mandatory injunction as required by the act.

Respectfully submitted,

S. S. TIPTON,

A. G. RITTER,

Attorneys for Appellants.

United States
Circuit Court of Appeals

For the Ninth Circuit.

NAT ROGAN, Collector of Internal Revenue for
the Sixth Internal Revenue Collection District
of California,

Appellant,

vs.

THE STARR PIANO COMPANY, PACIFIC
DIVISION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

FILED

APR 1 - 1943

PAUL F. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

NAT ROGAN, Collector of Internal Revenue for
the Sixth Internal Revenue Collection District
of California,

Appellant,

VS.

THE STARR PIANO COMPANY, PACIFIC
DIVISION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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In the District Court of the United States in and
for the Southern District of California

No. 1459-O.C.

THE STARR PIANO COMPANY, PACIFIC DIVISION, a corporation,

Plaintiff,

vs.

NAT ROGAN, Collector of Internal Revenue for
the Sixth Internal Revenue Collection District
of California,

Defendant.

COMPLAINT FOR THE RECOVERY OF IN-
COME AND EXCESS PROFITS TAXES
ILLEGALLY ASSESSED AND COL-
LECTED.

Comes now the plaintiff, complains of the defendant and for cause of action alleges:

I.

That at all times herein mentioned plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business located in the County of Los Angeles, in said State of California.

II.

That at all times from and after July 1, 1935 defendant has been and now is the duly appointed, qualified and acting Collector of Internal Revenue

for the Sixth Internal Revenue Collection District of California. That defendant is the person to whom the sums herein sought to be recovered were paid, as hereinafter set forth. That at all times herein mentioned, defendant was and still is a resident of the County of Los Angeles and of the Southern District of California, Central Division.

III.

That this is an action for the recovery of Federal income [2] and excess-profits taxes and interest for the calendar year 1934 erroneously and illegally assessed and collected from plaintiff in the amount of \$73,557.08.] a
B

IV.

That on or about April 15, 1935 pursuant to extension of time to file return granted by defendant, plaintiff caused to be made and filed its federal income and excess-profits tax return for the calendar year ended December 31, 1934. That said return disclosed a net income subject to tax for said calendar year in the sum of \$647.24 and a federal income tax due in the sum of \$89.00. That said return disclosed no liability for excess profits tax on the part of plaintiff for said year. That said tax liability in the amount of \$89.00 together with interest in the amount of \$.11 to cover the late payment of the first installment of tax was paid at the following times and in the following amounts: \$22.36 on April 15, 1935; \$22.25 on June 15, 1935; A
B

\$22.25 on September 16, 1935 and \$22.25 on December 16, 1935.

V.

That thereafter the Commissioner of Internal Revenue through his agents caused said income and excess-profits tax return of plaintiff for the calendar year 1934 to be audited. That as a result of said audit there was proposed and assessed against plaintiff a deficiency in income tax for said calendar year in the amount of \$46,240.78 and a deficiency in excess profits tax for said year in the amount of \$16,222.19. That plaintiff paid to defendant said deficiencies in income and excess-profits tax together with interest in the amount of \$11,094.11 or a total sum of \$73,557.08 on March 3, 1938.

VI.

That the true and correct net income of plaintiff for [3] said calendar year 1934 did not exceed the sum of \$674.24 reported by plaintiff on its income tax return for said year as aforesaid. That plaintiff's true and correct income tax liability for said calendar year 1934 did not exceed \$89.00 paid by plaintiff as aforesaid. That all sums in excess of said sum of \$89.00 assessed and collected from plaintiff as and for income taxes for said calendar year 1934 and all sums assessed and collected from plaintiff as and for excess-profits tax for said year and all sums in excess of \$.11 collected as interest on account of late payment of tax, as aforesaid, were erroneously and illegally assessed upon and collected from plaintiff by defendant as and

for federal income and excess-profits taxes and interest for said calendar year 1934 and in that regard plaintiff alleges:

VII.

That prior to 1922 plaintiff acquired certain long-term leases in the City of Los Angeles. That during the year 1922 plaintiff caused Gennett Realty Company, a corporation, to be incorporated under the laws of the State of California. That said Gennett Realty Company was incorporated by plaintiff for the mere purpose of holding title to the long-term leases aforesaid. That immediately after the incorporation of said Gennett Realty Company, plaintiff transferred said leases to it in exchange for all of the capital stock of said company except for directors' qualifying shares and that plaintiff did at all times during the existence of said Gennett Realty Company own all the shares of said Gennett Realty Company except said qualifying shares. That the property covered by said long-term leases aforesaid was subleased to plaintiff by said Gennett Realty Company and, thereafter, plaintiff and Gennett Realty Company joined in a sublease of said leases to a third party. [4] That the officers and directors of plaintiff were also officers and directors of Gennett Realty Company. That Gennett Realty Company maintained no separate business offices and hired no separate employees and its business affairs were conducted in the office of plaintiff by officers and employees of plaintiff. That the affairs of Gennett Realty

Company were directed and controlled by plaintiff and that said company was operated as a department of plaintiff. That in 1934 plaintiff and Gennett Realty Company entered into a merger agreement pursuant to and in accordance with Sections 361 to 362(c) inclusive of the Civil Code of the State of California and said Gennett Realty Company was merged into plaintiff pursuant to the aforesaid provisions of law. That as a result of said merger the assets of said Gennett Realty Company including said long-term leases became the property of plaintiff. That there passed to plaintiff as a result of said merger \$2.10 in cash and accounts receivable in the amount of \$24,006.42. That plaintiff became liable for debts of Gennett Realty Company as a result of said merger in the amount of \$1,588.59. That in its income and excess-profits tax return for the calendar year 1934 plaintiff did not report any gain or loss by reason of the mere acquisition of said leases and accounts receivable as the result of said merger. That plaintiff is informed and believes and on the basis of such information and belief alleges that the deficiency in income and excess-profits taxes and interest assessed against and collected from plaintiff, as aforesaid, for said calendar year 1934 was predicated upon the determination by the Commissioner of Internal Revenue that the acquisition by plaintiff of the assets of said Gennett Realty Company, as aforesaid, resulted in taxable gain realized by plaintiff in the amount of \$316,024.89. That [5] said taxable gain was arrived at by the Commissioner of In-

ternal Revenue by deducting from the value of the assets received by plaintiff on said merger consisting of \$2.10 in cash, said accounts receivable in the amount of \$24,006.42 and said long-term leases, one of which was valued by said Commissioner at \$39,720.61 and the other of which was valued by said Commissioner at \$366,884.35, the liabilities of Gennett Realty Company in the amount of \$1,588.59 and the cost to plaintiff of the stock of said Gennett Realty Company determined by the Commissioner to be \$113,000.00. That the Commissioner of Internal Revenue erred in determining that the acquisition of assets of Gennett Realty Company by plaintiff resulted in a gain taxable to plaintiff in said amounts in that (in substance said Gennett Realty Company had no separate existence from plaintiff and was merely the Agent or instrumentality of plaintiff and was not in fact an entity separate therefrom) and in that (the transaction by which plaintiff became the owner of the assets of said Gennett Realty Company was a merger as a result of which plaintiff realized, as the surviving corporation, no gain or loss) and in that in the alternative even (if there was a gain realized by plaintiff on the acquisition of said assets, as aforesaid, said gain was one resulting from an exchange taking place in connection with a reorganization which was not recognizable for federal income tax purposes under the provisions of Section 112 of the Revenue Act of 1934.)

VIII.

That on or about August 18, 1939 plaintiff caused to be made and filed with defendant its written claim for refund of income and excess profits taxes and interest assessed and collected against plaintiff, as aforesaid, for the calendar year 1934 in the [6] amount of \$73,557.08. That a true and correct copy of said claim for refund is attached hereto, marked Exhibit A, referred to and by this reference made a part hereof. That said claim for refund was based upon the same grounds and facts relied upon herein.

IX.

That on or about September 20, 1940 plaintiff's said claim for refund was disallowed by the Commissioner of Internal Revenue. That the letter of the Commissioner of Internal Revenue notifying plaintiff of the disallowance of its said claim for refund was dated September 20, 1940.

X.

That no part of said sum of \$73,557.08 assessed and collected from plaintiff as and for income and excess profits tax and interest, as aforesaid, has been refunded to plaintiff by defendant or any other person. That no action has been had in Congress upon said claim for refund or in any other department of the Government. That plaintiff is the sole owner of the claim here sued upon and that said sum of \$73,557.08 is due and owing from defendant to plaintiff, together with interest thereon at

the rate of six per cent per annum from the date of payment thereof.

Wherefore plaintiff prays for judgment herein in the amount of \$73,557.08 together with interest thereon as provided by law, and for such other and further relief as may be deemed just in the premises.

CLAUDE I. PARKER, (HG)

JOHN B. MILLIKEN, (HG)

BAYLEY KOHLMEIER,

HARRIET GEARY,

Attorneys for Plaintiff,

808 Bank of America Building,

Los Angeles, California. [7]

State of California,

County of Los Angeles—ss.

Philip Johnson being first duly sworn, deposes and says: that he is an officer, to-wit, Secretary, of The Starr Piano Company, Pacific Division, plaintiff herein; that he has read the foregoing complaint and knows the contents thereof and that the same is true except as to the matters therein stated upon his information or belief and as to those he believes it to be true.

PHILIP JOHNSON.

Subscribed and sworn to before me a Notary Public this 19th day of March, 1941.

[Seal] M. LE SAGE,

Notary Public in and for the County of Los Angeles, State of California. [8]

EXHIBIT A

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps
Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California,
County of Los Angeles—ss.

Type or Print

Name of taxpayer or purchaser of stamps, The
Starr Piano Company (Pacific Division).

Business address, 1344 South Flower Street, Los
Angeles, California.

The deponent, being duly sworn according to
law, deposes and says that this statement is made
on behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed,
6th District California.

2. Period (if for income tax, make separate

form for each taxable year) from Jan. 1, 1934, to Dec. 31, 1934.

3. Character of assessment or tax, Add'l Income and excess-profits taxes and interest.

4. Amount of assessment, \$73,557.08; dates of payment, March 3, 1938.

5. Date stamps were purchased from the Government

6. Amount to be refunded (or such greater amount as may be legally refundable), \$73,557.08.

7. Amount to be abated (not applicable to income or estate taxes)..... \$.....

8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1938, on March 3, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

(Attach letter-size sheets if space is not sufficient)

(Signed) STARR PIANO COMPANY,

By ALICE L. GENNETT,

President.

Sworn to and subscribed before me this 16 day of August, 1939.

M. H. AHLSSKOG,

Notary Public.

(See Instructions on Reverse Side)

[Printer's Note: Reverse side of paper consisting of a ruled form not filled out.] [9]

Claimant is a corporation with its principal place of business at Los Angeles, California, and is engaged primarily in the business of selling pianos.

Prior to 1922 claimant acquired certain long term leases of real estate, located on South Hill Street, in the City of Los Angeles, and generally known as the Mackey lease and the Pelton lease.

During the year 1922 claimant caused the Gennett Realty Company, a corporation, to be organized under the laws of the State of California. The Gennett Realty Company was organized by claimant for the purpose of holding title to said Mackey Lease and said Pelton Lease. Immediately after the organization of said company claimant transferred said leases to it in exchange for all of the capital stock of the company, except three directors qualifying shares. The property covered by said leases was subleased to claimant by the Gennett Realty Company and thereafter claimant and Gennett Realty Company joined in a sublease to a third party. All of the stock of the Gennett Realty Company, except the directors qualifying shares, was owned at all times by claimant. The officers and directors of claimant were also officers and directors of the Gennett Realty Company. The Gennett Realty Company maintained no separate business offices or employees and its business affairs were conducted in the office of claimant by officers and employees of claimant. The affairs of the Gennett Realty Company were directed by claimant and that company was operated as a department of claimant.

In 1934 it was decided by claimant that there was no need for Gennett Realty Company to continue as a separate corporation and that Gennett Realty Company should be merged into claimant. On July 31, 1934 claimant and Gennett Realty Company entered into a [10] merger agreement, pursuant to and in accordance with Sections 361 to 362(c) inclusive of the Civil Code of the State of California, whereby said corporations were merged.

As a result of said merger, the assets of Gennett Realty Company, including said Mackey Lease and said Pelton Lease, vested in claimant.

There also passed to claimant, as a result of said merger, \$2.10 in cash and accounts receivable in the amount of \$24,006.42. Claimant assumed liabilities of the Gennett Realty Company in the amount of \$1,588.59.

On July 31, 1934 the fair market value of said Mackey Lease did not exceed the sum of \$39,720.61 and the fair market value of said Pelton Lease did not exceed the sum of \$366,884.35. The cost to claimant of the stock of the Gennett Realty Company was not less than \$113,000.00.

In its income tax return for the year 1934 claimant did not report any gain or loss by reason of the acquisition of said leases and accounts receivable as a result of said merger. Thereafter, the Commissioner of Internal Revenue determined that claimant realized a gain upon the acquisition of said leases and accounts receivable in the amount of \$316,024.89 and assessed a deficiency income tax

against claimant for the year 1934 in the amount of \$46,240.78 and a deficiency excess-profits tax for the year 1934 in the amount of \$16,222.19. Claimant paid said tax together with interest thereon in the amount of \$11,094.11, or a total sum of \$73,557.08, to the Collector of Internal Revenue at Los Angeles, California on the third day of March, 1938. Said income tax and said excess-profits tax were erroneously and illegally assessed and collected from claimant for the reasons—

1. No gain was realized by claimant upon the acquisition [11] of said leases upon the merger of Gennett Realty Company into claimant. In view of the ownership of all the stock of Gennett Realty Company by claimant, the close relationship between the companies and the actual conduct of Gennett Realty Company by claimant as a department or mere instrumentality of claimant, Gennett Realty Company was not in actual fact a separate entity from claimant and should not have been so regarded. For all practical purposes claimant owned the assets of Gennett Realty Company and the merger of Gennett Realty Company into claimant resulted merely in a change of form of that ownership and did not result in the realization of gain by claimant. See *Southern Pacific Company v. Lowe*, 247 U.S. 330.

2. The transaction in this case was a merger and no gain or loss is realized upon the acquisition of property of the merged corporation by the surviving corporation as the result of the merger.

3. If there was a realization of gain by claim-

ant that gain was one resulting from a reorganization which was not recognizable, for income tax purposes, under the provisions of Section 112 of the Revenue Act of 1934.

Wherefore, it is respectfully requested that the taxes and interest paid by claimant for the year 1934 in the amount of \$73,577.08, as aforesaid, be refunded.

CERTIFICATE

I hereby certify that the foregoing claim for refund was prepared by me for and on behalf of said taxpayer; that the facts recited in said protest are the exact facts as given to me by representatives of taxpayer, and to the best of my knowledge and belief are true and correct. [12]

Dated at Los Angeles, California, this 4th day of August, 1939.

BAYLEY KOHLMEIER,

With Claude I. Parker, 808
Bank of America Bldg., Los
Angeles, California.

[Endorsed]: Filed Mar. 20, 1941. [13]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof, except that defendant denies that the income and excess-profits tax therein referred to were erroneously and/or illegally assessed and/or collected.

IV.

Admits the allegations contained in paragraph IV thereof, but in that connection alleges:

That on April 15, 1935, an extension of time having been granted, the Starr Piano Company, Pacific Division, the taxpayer, filed its income and excess-profits tax return on Treasury Form 1120 for the calendar year 1934 showing a gross income of \$170,207.69 (line 14), total deductions of \$169,560.45 (line 26), a net income subject to normal tax of \$647.24 (line 27) and no net income subject to excess-profits tax (line 37). The said return contained an income tax computation showing total income tax [14] of \$89.00 (line 84) which was paid

together with interest of 11 cents in four installments during the year 1935.

V.

Admits the allegations contained in paragraph V thereof, except that defendant alleges that after the filing of said return and the payment by plaintiff of the tax reported therein, the Commissioner of Internal Revenue determined that the net income of the taxpayer for the calendar year 1934 subject to normal income tax was not \$647.24 as reported but \$336,943.35 and that its net income subject to excess-profits tax was therefore \$324,443.35. He determined that the normal income tax for the year 1934 was not \$89.00 as reported but was \$46,240.78 and that there was an excess-profits tax due for that year in the amount of \$16,222.19; and that the taxpayer waived its right to appeal to the Board of Tax Appeals from these determinations of the Commissioner and that official, on or about January 21, 1938, assessed against it the deficiency in tax aforesaid with interest of \$7,906.54 on the income tax deficiency and \$2,773.77 on the excess-profits tax deficiency, a total of \$73,143.28. On March 2, 1938, there was assessed additional interest of \$413.80 making a total deficiency to that date of \$73,557.08 which was paid on March 3, 1938.

VI.

Denies the allegations contained in paragraph VI thereof.

VII.

Denies the allegations contained in paragraph VII thereof.

VIII.

Admits that plaintiff filed its claim for refund at the time, in the amount and for the year, as alleged in paragraph VIII thereof. However, in that connection, defendant alleges that on August 18, 1939, the taxpayer filed with the Collector of Internal Revenue for the Sixth Internal Revenue District of California at Los Angeles, a claim for refund on Treasury Form 843 in the amount of \$73,557.08 relating to the calendar year 1934 and grounded its claim for refund upon the follow- [15] ing: (1) that no gain was realized by the taxpayer by the acquisition of leases upon the merger of Gennet Realty Company, (2) that if it was a merger no gain or loss was realized and (3) that if there was a realization of gain that said gain was one resulting from a reorganization which was not subject to taxation; and that the claim for refund was disallowed by the Commissioner and notice of disallowance was given to the plaintiff by letter dated September 20, 1940.

IX.

Admits the allegations contained in paragraph IX thereof, except that defendant denies said allegations to the extent that they do not agree with the foregoing affirmative allegations contained in paragraph VIII of this Answer.

X.

Admits the allegations contained in paragraph X

thereof, except that defendant denies that any part of the sum therein referred to is due and/or owing from defendant to plaintiff. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is the sole, or other, owner of the claim sued upon by it.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Assistant United States At-
torney

ARMOND MONROE JEWELL

Assistant United States At-
torney

EUGENE HARPOLE

Special Attorney, Bureau of
Internal Revenue

By E. H. MITCHELL

Attorneys for defendant

[Endorsed]: Filed June 20, 1941. [16]

[Title of District Court and Cause.]

STIPULATION OF FACTS

The parties hereto through their respective counsel of record hereby stipulate and agree that in addition to the facts admitted by the pleadings, the

following facts are true and may be found as facts by the court:

I.

That on the 1st day of February, 1921, plaintiff, as lessee, entered into a ninety-nine year lease covering the property situated in the City of Los Angeles, County of Los Angeles, State of California, described as

Lots 19 and 20 in Block 18 of Ord's Survey, as per map recorded in Book 34, at page 89 of Miscellaneous Records in the office of the County Recorder of Los Angeles County, California, with Clara Howes Mackey, as lessor. This lease was commonly known as the Mackey Lease. That on the 1st day of March, 1921, plaintiff, as lessee, entered into a ninety-nine year lease covering the property situated in the City of Los Angeles, County of Los Angeles, State of California, described as

Lot 18 in Block 18 of Ord's Survey, as per map recorded in Book 34, at page 89 of Miscellaneous Records in the office of the County Recorder of Los Angeles County, California, with Arthur N. Pelton, as lessor. This lease was commonly known as the Pelton Lease. [17]

II.

During the month of May, 1922, plaintiff caused the Gennett Realty Company, a corporation, to be incorporated under the laws of the State of California. The Gennett Realty Company was caused

to be organized by plaintiff for the purpose of holding legal title to the said Mackey and the said Pelton leases. On the 17th day of July, 1922, plaintiff transferred all of its right, title and interest in and to the said Mackey Lease and the said Pelton Lease to the Gennett Realty Company in exchange for all of the capital stock of the said Gennett Realty Company, to wit: one thousand shares of common stock. Three shares of the said one thousand shares of common stock were nominally held by three individuals as directors' qualifying shares. At all times during the existence of the Gennett Realty Company plaintiff owned all of the outstanding and issued stock of said corporation. On the 1st day of August, 1922, Gennett Realty Company, as lessor, and plaintiff, as lessee, entered into a sublease of the property covered by the said Mackey and Pelton leases. This sublease was for a term of fifteen years. During the year 1922 Gennett Realty Company issued its bonds in the amount of \$200,000.00 for the purpose of raising funds to construct a building on the property covered by the said Pelton Lease. Said funds were raised and a building was actually constructed on the property covered by the said Pelton Lease. On the 1st day of July, 1923, Gennett Realty Company and plaintiff, as lessors, entered into a sublease with Bullock's, a California corporation, as lessee, of the property covered by the Pelton Lease. The term of said sublease was for a period of twenty-five years commencing with the 1st day of July, 1923 and ending on the 30th day of June, 1948. On the

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1st day of May, 1924 the term of the said sublease agreement of the 1st of July, 1923 was extended until the 30th day of April, 1984. On the 1st day of May, 1924, [18] Gennett Realty Company and plaintiff, as lessors, entered into a sublease with Bullock's, a California corporation, as lessee of the property covered by the Mackey Lease. The term of said sublease was for a period of sixty years commencing with the 1st day of May, 1924 and ended on the 30th day of April, 1984.

III.

That during the term of the existence of the Gennett Realty Company, the members of the Board of Directors and the officers of said company were persons employed by plaintiff and were actively engaged in the activities carried on by plaintiff. Said Gennett Realty Company had no office separate and apart from plaintiff. Said Gennett Realty Company had no assets except the leases hereinabove mentioned. Said Gennett Realty Company did not have a bank account. Said Gennett Realty Company had no employees other than its officers and directors. All bookkeeping of the Gennett Realty Company was done by an employee of plaintiff. All indebtedness of the Gennett Realty Company was paid by check of the plaintiff, and plaintiff was credited on its account with Gennett Realty Company for said payments. All rentals accruing under said subleases to the Gennett Realty Company were collected by the Security-First National Bank of Los Angeles in a trustee account

on behalf of said Gennett Realty Company. The Security-First National Bank, as such trustee, provided for the retirement of the bonds of said Gennett Realty Company. Said trustee further provided for the payment of all interest on said bonds and taxes due on the leased properties. For the years 1922, 1923 and 1924 plaintiff and Gennett Realty Company filed separate corporate income tax returns. At all other times during its existence, with the exception for the year 1934, the year in which said Gennett Realty Company was merged into plaintiff, Gennett Realty Company and plaintiff filed consolidated corporate income and franchise tax returns. During the year 1934 plaintiff [19] transferred certain accounts to Gennett Realty Company to be collected in the name of Gennett Realty Company. Part of said accounts were collected in the name of Gennett Realty Company. The uncollected accounts were transferred back to plaintiff by Gennett Realty Company. That during the term of its existence the Gennett Realty Company carried on no activities except as set forth in this stipulation of facts.

IV.

That during July and August, 1934, the Gennett Realty Company merged into plaintiff. Said merger was made in compliance with the provisions of Division First, Part IV, Title I, Chapter XIII of the Civil Code of California. That a true and correct copy of the merger agreement whereby Gennett Realty Company was merged into plaintiff is at-

tached hereto, designated "Exhibit A" and hereby made a part hereof. That said merger agreement was approved by the Board of Directors of Gennett Realty Company, the shareholders of Gennett Realty Company, the Board of Directors of plaintiff, and all the shareholders of plaintiff on the 31st day of July, 1934. The certificate of the President and Secretary of plaintiff setting forth the time and place of the special meeting of the Board of Directors of plaintiff in which the said merger agreement was approved, a copy of the resolution approving said merger agreement adopted at said meeting, the vote in favor of the resolution, the time and place of the meeting of the shareholders of plaintiff at which the said merger agreement was approved, the vote by which said merger agreement was approved, the number and class of the outstanding shares of plaintiff and a statement of the mailing of the notice of the time, place and purpose of the said meeting of said shareholders, was executed by Fred Gennett, president of plaintiff, and Harry L. Nolder, secretary of plaintiff, on the 31st day of July, 1934. A true and correct copy of said certif- [20] icate is attached hereto, designated "Exhibit B" and hereby made a part hereof. Said certificate was filed with the Secretary of State of the State of California in Sacramento, California, on the 1st day of August, 1934. A copy of said certificate certified by the Secretary of State of the State of California was filed with the County Clerk of the County of Los Angeles, State of California, the county in which plaintiff had its principal place

of business, on the 10th day of August, 1934. The certificate of Fred Gennett, President, and Philip Johnson, Secretary, of Gennett Realty Company setting forth the time and place of the special meeting of the Board of Directors of Gennett Realty Company in which the said merger agreement was approved, a copy of the resolution approving said merger agreement adopted at said meeting, the vote in favor of the resolution, the time and place of the meeting of the shareholders of Gennett Realty Company at which the said merger agreement was approved, the vote by which said merger agreement was approved, the number and class of the outstanding shares of plaintiff and a statement of the mailing of the notice of the time, place and purpose of the said meeting of said shareholders, was executed by Fred Gennett, President of Gennett Realty Company, and Philip Johnson, Secretary of Gennett Realty Company, on the 31st day of July, 1934. A true and correct copy of said certificate is attached hereto, designated "Exhibit C" and hereby made a part hereof. Said certificate was filed with the Secretary of State of the State of California in Sacramento, California, on the 1st day of August, 1934. A copy of said certificate certified by the Secretary of State of the State of California was filed with the County Clerk of the County of Los Angeles, State of California, the county in which Gennett Realty Company had its principal place of business, on the 10th day of August, 1934. [21]

VI.

That the deficiency in Federal income and excess profit taxes paid by plaintiff on March 3, 1938 was occasioned solely by the Commissioner of Internal Revenue's determination that gain or loss was recognizable for Federal income and excess profit tax purposes upon receipt by plaintiff of property as a result of the merger of Gennett Realty Company into plaintiff. That if plaintiff is correct in its position that the property received by it as a result of the merger of Gennett Realty Company into plaintiff is not in any part a receipt of income taxable for Federal income and excess profit tax purposes for the calendar year 1934, plaintiff is entitled to recover as prayed for in the complaint herein. That if the Commissioner of Internal Revenue was correct in his position that gain or loss was recognizable for Federal income and excess profit tax purposes upon the receipt of property by plaintiff as a result of the said merger of Gennett Realty Company into plaintiff, the said deficiency was correctly computed by the Commissioner of Internal Revenue and plaintiff is not entitled to recovery in this action.

Dated: January 5, 1942.

CLAUDE I. PARKER (STB)
JOHN B. MILLIKEN (STB)
BAYLEY KOHLMEIER (STB)
STUART T. BARON

Attorneys for Plaintiff

808 Bank of America Building,
Los Angeles, California

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Assistant United States At-
torney

ARMOND MONROE JEWELL

Assistant United States At-
torney

By ARMOND MONROE JEWELL

Attorneys for Defendant [22]

EXHIBIT A

MERGER AGREEMENT

This Agreement made this 31st day of July, 1934 by and between The Starr Piano Company (Richmond, Indiana), Pacific Division, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter called "The Piano Company", and Gennett Realty Company, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter called "The Realty Company," Witnesseth:

Whereas, The Piano Company owns all of the issued and outstanding shares of the capital stock of The Realty Company, with the exception of three shares owned by its directors, and the said companies have agreed to reorganize and to carry out such reorganization by means of a statutory merger or consolidation under and in accordance with the

provisions of Sections 361 to 362-c inclusive of the Civil Code of the State of California, and deem it to be to their best interests and to the best interests of their respective shareholders to merge The Realty Company into The Piano Company, to the end that The Piano Company shall, after such merger, be and become the surviving corporation, as provided in Section 361 of said Civil Code, and

Whereas, there are now issued and outstanding one hundred (100) shares of the common capital stock of The Piano Company of the par value of One Hundred Dollars (\$100.) per share, being the entire number of authorized shares of said The Piano Company, and such shares are held by seven individual stockholders, the names of such stockholders and the number of shares held by each being as follows, to-wit: [23]

Name	No. of Shares
Clarence Gennett	14
Alice L. Gennett	14
Rose Gennett Martin	14
Fred Gennett	13
Harry Gennett	14
Harry L. Nolder	29
Georgia A. Nolder	1
Philip Johnson	1

and

Whereas, there are now issued and outstanding one hundred (100) shares of the capital stock of The Realty Company, the same being the entire number of authorized shares of said corporation, the names of the shareholders thereof and the num-

ber of shares held by each being as follows, to-wit:

Name	No. of Shares
The Starr Piano Company (Richmond, Indiana), Pacific Division	97
Harry L. Nolder	1
Fred Gennett	1
Philip Johnson	1

Now, Therefore, in consideration of the premises, it is hereby agreed as follows:

First: The Starr Piano Company (Richmond, Indiana) Pacific Division and Gennett Realty Company shall merge, and the same hereby do so merge into The Starr Piano Company (Richmond, Indiana), Pacific Division, and said The Starr Piano Company (Richmond, Indiana), Pacific Division, shall be and the same hereby is the surviving corporation resulting from such merger.

Second: All of the assets of Gennett Realty Company of every kind or nature, both real and personal, wheresoever situated, shall ipso facto, by virtue of this merger agreement, be and become vested in The Starr Piano Company (Richmond, Indiana), Pacific Division. Included in the said assets of Gennett Realty Company are the following leasehold estates: [24]

1. The leasehold created by that certain lease dated February 1, 1921, wherein Clara Howes Mackey is lessor and The Starr Piano Company (Richmond, Indiana), Pacific Division, a California corporation, is lessee, which said

lease is recorded in Book 984, at page 232, of Leases, in the office of the County Recorder of Los Angeles County, California, and which covers that certain real estate situated in the City of Los Angeles, County of Los Angeles, State of California, described as Lots 19 and 20 in Block 18 of Ord's Survey, as per Map recorded in Book 34, at page 89, of Miscellaneous Records of said Los Angeles County, and which is for the term of *niney-nine* (99) years, beginning on said first day of February, 1921, and ending on the thirty-first day of January, 2020; and which Lease was assigned by said The Starr Piano Company (Richmond, Indiana), Pacific Division, to Gennett Realty Company on the 17th day of July, 1922.

2. The leasehold created by that certain lease dated March 1, 1921, wherein Arthur M. Pelton is lessor and The Starr Piano Company (Richmond, Indiana), Pacific Division, is lessee, which said lease is recorded in Book 142, at page 228, of Leases, in the office of the County Recorder of Los Angeles County, California, and which covers that certain real estate situated in the City of Los Angeles, County of Los Angeles, State of California, described as Lot 18, in Block 18 of Ord's Survey, as per Map recorded in Book 34, at page 89, of Miscellaneous Records of said Los Angeles County, and which lease is for the term of ninety-nine (99) years, beginning on the first day of March, 1921, and ending on the thirtieth

day of April, 2020; and which lease was assigned by The Starr Piano Company (Richmond, Indiana), Pacific Division, to Gennett Realty Company on the 17th day of July, 1922.

Third: The Starr Piano Company (Richmond, Indiana), Pacific Division, shall, and does hereby agree so to do, assume and pay all of the debts, liabilities and obligations of every kind or nature of Gennett Realty Company.

Fourth: All shares of the Capital stock of Gennett Realty Company now outstanding shall ipso facto by virtue of this agreement be surrendered and cancelled and the holders thereof shall surrender the respective shares held by them to the Secretary of The Starr Piano Company (Richmond, Indiana), Pacific Division, for cancellation on or before the first day of August, 1934. The shares of The Starr Piano Company (Richmond, Indiana), Pacific Division, now outstanding, as aforesaid, shall be unaffected by this agreement, but the owners of [25] said shares and the respective number of shares held by each shall continue as above set out.

Fifth: All of the assets of Gennett Realty Company shall be merged into and acquired by The Starr Piano Company (Richmond, Indiana), Pacific Division, as of the first day of August, 1934, and the liabilities of Gennett Realty Company shall be assumed by The Starr Piano Company (Richmond, Indiana), Pacific Division, in the respective amounts thereof existing on said date. All surplus, whether earned surplus or paid in surplus, and all

unrealized profits of Gennett Realty Company shall be added to the earned surplus, paid in surplus and unrealized profits respectively of The Starr Piano Company (Richmond, Indiana), Pacific Division, and shall be set up on the books of the latter as an increase in the earned surplus, paid in surplus and unrealized profits respectively of The Starr Piano Company (Richmond, Indiana), Pacific Division, and may be thereafter dealt with as such in the declaration of dividends by The Starr Piano Company (Richmond, Indiana), Pacific Division, or otherwise. All other items of assets of Gennett Realty Company, after deducting therefrom the said sums of earned surplus, paid in surplus and unrealized profits, shall be added to the capital of The Starr Piano Company (Richmond, Indiana), Pacific Division.

In Witness Whereof, the parties hereto have caused this agreement to be executed by their respective presidents or vice-presidents and secretaries or assistant secretaries and caused their respective seals to be affixed hereto this 31st day of July, 1934.

THE STARR PIANO
COMPANY
(RICHMOND, INDIANA),
PACIFIC DIVISION.

[Seal] By FRED GENNETT

President

By HARRY L. NOLDER

Secretary

GENNETT REALTY
COMPANY,

[Seal] By FRED GENNETT

President

By PHILIP JOHNSON

Secretary [26]

State of California

County of Los Angeles—ss.

On this 31st day of July, A. D. 1934, before me, Mary S. Alexander, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Fred Gennett, known to me to be the President, and Harry L. Nolder, known to me to be the Secretary of The Starr Piano Company (Richmond, Indiana), Pacific Division, the corporation which executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MARY S. ALEXANDER

Notary Public in and for said County and State.

[27]

State of California

County of Los Angeles—ss.

On this 31st day of July, A. D. 1934, before me, Mary S. Alexander, a Notary Public in and for said

County and State, residing therein, duly commissioned and sworn, personally appeared Fred Gennett known to me to be the President, and Philip Johnson, known to me to be the Secretary of Gennet Realty Company, the corporation which executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MARY S. ALEXANDER
Notary Public in and for said County and State.

[28]

EXHIBIT B
CERTIFICATE
of

THE STARR PIANO COMPANY (RICHMOND, INDIANA), PACIFIC DIVISION.

The Undersigned, Fred Gennett and Harry L. Nolder, do hereby certify that they are and have been at all times herein mentioned the duly elected and acting President and Secretary, respectively, of The Starr Piano Company (Richmond, Indiana), Pacific Division, a California corporation, and do further hereby certify:

(a) That a special meeting of the Board of Directors of said corporation was duly and regu-

larly held on July 31st, 1934, at the office of the corporation, 1344 South Flower Street, Los Angeles, California, at which meeting there was at all times present and acting more than a quorum of said board, to-wit, four of the five members thereof;

(b) That at said meeting the following resolution was duly adopted:

Resolved, that the form of Merger Agreement between this company and Gennett Realty Company, as presented at this meeting, be and the same is hereby approved.

Be it further resolved, that when said agreement shall have been approved by the stockholders of the company, in accordance with the provisions of Section 361 of the Civil Code of the State of California, that the President or Vice-President and Secretary or Assistant Secretary of the company be and they are hereby authorized and directed to execute said agreement on behalf of this company and to execute the certificate covering proceedings for merger as set forth in said Section 361 of the Civil Code of California, and to file said agreement and certificate with the Secretary of State of the State of California, and to do such other acts and to file such other documents and papers as they may deem advisable or necessary to complete the merger of this company with Gennett Realty Company in accordance with the terms of said merger agreement and the provisions of Section 361 of the Civil Code of California.

(c) That the vote in favor of said resolution was 4; [29]

(d) That a special meeting of all of the shareholders of said corporation was duly held at ten o'clock A. M., on July 31, 1934, at the principal office of said corporation, located at 1344 South Flower Street, Los Angeles, California; that at said meeting said resolution of the Board of Directors was approved by the vote of 100 shares of the capital stock of said corporation, constituting the vote of the holders of not less than two-thirds of the issued and outstanding shares of said corporations;

(e) That the total number of outstanding shares of said corporation is one hundred (100) shares, and all of said shares are common shares;

(f) The mailing of the notice of the time, place and purpose of said shareholders' meeting was duly given in accordance with the provisions of Section 361 of the Civil Code of the State of California.

In Witness Whereof, the undersigned have executed this Certificate this 31st day of July, 1934.

FRED GENNETT

President of The Starr Piano
Company (Richmond, Indiana),
Pacific Division.

HARRY L. NOLDER

Secretary of The Starr Piano
Company (Richmond, Indiana),
Pacific Division.

State of California

County of Los Angeles.—ss.

Fred Gennett and Harry L. Nolder, being first duly sworn, each for himself deposes and says:

That Fred Gennett is and was at all the times mentioned in the foregoing Certificate, the President of The Starr Piano [30] Company (Richmond, Indiana), Pacific Division, the California corporation therein mentioned, and Harry L. Nolder is and was at all of said times the Secretary of said corporation; and each has read said Certificate and that the statements therein made are true of his own knowledge, and that the signatures purporting to be the signatures of said President and Secretary thereto, are the genuine signatures of said President and Secretary, respectively.

FRED GENNETT

HARRY L. NOLDER

Subscribed and sworn to before me this 31st day of July, 1934.

MARY S. ALEXANDER

Notary Public in and for the County of Los Angeles, State of California. [31]

EXHIBIT C

CERTIFICATE OF
GENNETT REALTY COMPANY.

The Undersigned, Fred Gennett and Philip Johnson, do hereby certify that they are and have

been at all times herein mentioned the duly elected and acting President and Secretary, respectively, of Gennett Realty Company, a California corporation, and do further hereby certify:

(a) That a special meeting of the Board of Directors of said corporation was duly and regularly held on July 31st, 1934, at the office of the corporation, 1344 South Flower Street, Los Angeles, California, at which meeting there was at all times present and acting more than a quorum of said board, to-wit: Three of the three members thereof;

(b) That at said meeting the following resolution was duly adopted:

Resolved, that the form of Merger Agreement between this Company and The Starr Piano Company (Richmond, Indiana), Pacific Division, as presented at this meeting, be and the same is hereby approved.

Be It Further Resolved, that when said agreement shall have been approved by the stockholders of the company in accordance with the provisions of Section 361 of the Civil Code of the State of California, that the President or Vice-President and Secretary or Assistant Secretary of the company be and they are hereby authorized and directed to execute said agreement on behalf of this company and to execute the certificate covering proceedings for merger as set forth in said Section 361 of the Civil Code of California, and to file said agreement and certificate with the Secretary of State of the State of California, and to do such

other acts and to file such other documents and papers as they may deem advisable or necessary to complete the merger of this company with The Starr Piano Company (Richmond, Indiana), Pacific Division, in accordance with the terms of said Merger Agreement and the provisions of Section 361 of the Civil Code of California.

(c) That the vote in favor of said resolution was 3; [32]

(d) That a special meeting of all of the shareholders of said corporation was duly held at 10:00 o'clock A. M. on July 31st, 1934, at the principal office of said corporation, located at 1344 South Flower Street, Los Angeles, California; that at said meeting said resolution of the board of directors was approved by the vote of 100 shares of the capital stock of said corporation, constituting the vote of the holders of not less than two-thirds of the issued and outstanding shares of said corporation;

(e) That the total number of outstanding shares of said corporation is one hundred (100) shares, and all of said shares are common shares;

(f) The mailing of the notice of time, place and purpose of said shareholders' meeting was duly given in accordance with the provisions of Section 361 of the Civil Code of the State of California.

In Witness Whereof, the undersigned have executed this Certificate this 31st day of July, 1934.

FRED GENNETT

President of Gennett Realty
Company.

PHILIP JOHNSON

Secretary of Gennett Realty
Company.

State of California

County of Los Angeles—ss.

Fred Gennett and Philip Johnson, being first duly sworn, each for himself deposes and says:

That Fred Gennett is, and was at all the times mentioned [33] in the foregoing Certificate, the President of Gennett Realty Company, the California Corporation therein mentioned, and Philip Johnson is, and was at all of said times, the Secretary of said corporation; and each has read said Certificate and that the statements therein made are true of his own knowledge, and that the signatures purporting to be the signatures of said President and Secretary thereto are the genuine signatures of said President and Secretary, respectively.

FRED GENNETT

PHILIP JOHNSON

Subscribed and sworn to before me this 31st day of July, 1934.

MARY S. ALEXANDER

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 5, 1942. [34]

[Title of District Court and Cause.]

MINUTE ORDER AND MEMORANDUM
DECISION

The above-entitled cause heretofore submitted for decision on a stipulation of facts and briefs is now decided as follows:

The court, having considered the facts in the stipulation of the parties hereto and the briefs of counsel, including the letter of the attorney for the defendant dated August 19, 1942 and the letter of the attorneys for the plaintiff dated September 15, 1942, and the opinions attached to said letters, now finds in favor of the plaintiff and orders that plaintiff do have and recover of the defendant the sum of \$73,557.08, together with interest thereon as provided by law and as prayed for in said complaint.

The court is of the view that by reason of the actions of the plaintiff, The Starr Piano Company, Pacific Division, a corporation, and its wholly owned subsidiary, The Gennett Realty Company, a California corporation, set forth in the merger agreement of July 31, 1934, and the certificates of the same date, there occurred a statutory merger under the provisions of Sections 361-361(a) of the Civil Code of the State of California. This merger was a reorganization under Section 112(g)(1) of the Revenue Act of 1934. As the plaintiff corporation already owned the entire capital stock of the Gennett Corporation, it was not necessary that the property of the subsidiary, title to which automatically vested in the plaintiff upon merger, should

be [35] exchanged for stock in the parent corporation. The stock of the subsidiary corporation was surrendered and cancelled upon merger. Under the circumstances, the plaintiff is entitled to the full benefit of the provisions of Section 112(b)(4) of the Revenue Act of 1934 to the effect that no gain or loss accrues upon a statutory reorganization.

The court is also of the view that the facts in the case warrant us in disregarding entirely the entity of the Gennett Realty Company. It had no substantial separate existence apart from the parent corporation. Its sole object was to hold legal title to certain leaseholds. During its entire existence with the exception of a period of 1922, 1923, 1924, and the year of the merger, 1934, the subsidiary and the plaintiff filed consolidated corporate income and franchise tax returns. For this reason we do not believe that the parent corporation should be charged with any gain on the acquisition of the assets of the subsidiary through the statutory merger.

The cause having been submitted entirely on stipulated facts, the said stipulated facts may stand for the findings of the court, no other findings being necessary. Counsel for the plaintiff, however, are required to prepare formal judgment in conformity with Local Rule 8.

Dated this 26th day of September, 1942.

Counsel notified.

[Endorsed]: Filed Sept. 26, 1942. [36]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled cause came on regularly for trial before the Honorable Judge, Leon R. Yankwich, presiding without a jury; plaintiff appearing by its attorneys, Claude I. Parker and John B. Milliken, and defendant appearing by his attorneys, E. H. Mitchell, Assistant United States Attorney, and Edward J. O'Connor, Assistant United States Attorney.

Written stipulation of facts was filed and the cause submitted for decision. The Court adopts the written stipulation of facts and its findings of fact and makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That the merger of the plaintiff, The Starr Piano Company, Pacific Division, and The Gennett Realty Company, was a statutory merger and a reorganization within the provision of Sec. 112(g)(1) of the Revenue Act of 1934. [37]

2. That the acquisition of the assets of The Gennett Realty Company by plaintiff, The Starr Piano Company, was a transaction within the scope of Sec. 112(b)(4) of the Revenue Act of 1934 and was one in connection with which no gain or loss was recognized for income tax purposes.

3. That plaintiff, The Starr Piano Company, and The Gennett Realty Company were so closely related in control, management and operation that

the separate entity of The Gennett Realty Company should be disregarded.

4. That no gain or loss was realized by plaintiff, The Starr Piano Company, upon the acquisition by it of the assets of The Gennett Realty Company as the result of the merger of said corporations during the year 1934.

5. That income and excess profits taxes and interest thereon for the year 1934 in the total amount of Seventy-Three Thousand Five Hundred Fifty-Seven and 08/100 Dollars (\$73,557.08) were erroneously assessed and collected from plaintiff by defendant and should be refunded.

6. That plaintiff is entitled to judgment against defendant in the sum of Seventy-Three Thousand Five Hundred Fifty-Seven and 08/100 Dollars (\$73,557.08) together with interest thereon at the rate of six per cent (6%) per annum from March 3, 1938, as provided by law, and its costs and disbursements in this action expended.

Dated at Los Angeles, California, this 3rd day of October, 1942.

LEON R. YANKWICH

Judge of the United States
District Court.

Approved as to form as provided in Rule 8. October 1, 1942.

EDWARD J. O'CONNOR

Attorney for Defendant.

[Endorsed]: Filed Oct. 3, 1942. [38]

In the District Court of the United States, Southern
District of California, Central Division

No. 1459-Y Civil

THE STARR PIANO COMPANY,
Plaintiff,

vs.

NAT ROGAN,
Defendant.

JUDGMENT

Hon. Leon R. Yankwich, District Judge.

The above-entitled cause came on regularly for trial before the Honorable Leon R. Yankwich, presiding without a jury; plaintiff appearing by its attorneys, Claude I. Parker and John B. Milliken, and defendant appearing by his attorneys, E. H. Mitchell, Assistant United States Attorney, and Edward J. O'Connor, Assistant United States Attorney.

Written stipulation of facts having been filed and the cause submitted for decision.

Wherefore, by reason of law and the facts herein, it is Ordered, Adjudged and Decreed that the plaintiff have and recover of defendant the sum of Seventy-three Thousand Five Hundred Fifty-seven and 08/100 Dollars (\$73,557.08), together with interest thereon at the rate of six per cent (6%) per annum from March 3, 1938, as provided by law, together with plaintiff's costs and disbursements in this action expended in [39] the amount of \$28.45.

Dated at Los Angeles, California, this 3rd day of October, 1942.

LEON R. YANKWICH

Judge of the United States
District Court.

Approved as to form as provided in Rule 8.

EDWARD J. O'CONNOR

Attorney for Defendant.

Judgment entered Oct. 3, 1942, Docketed Oct. 3, 1942, C. O. Book 11, Page 531. Edmund L. Smith, Clerk; Louis J. Somers, Deputy.

[Endorsed]: Filed Oct. 3, 1942. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Nat Rogan, defendant in the above entitled case, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in the above entitled case on October 3, 1942, which is in favor of the plaintiff and against the defendant herein, for the sum of \$73,557.08, plus interest, from March 3, 1938.

LEO V. SILVERSTEIN,

United States Attorney.

By EDWARD J. O'CONNOR,

Assistant United States

Attorney,

Attorneys for Defendant.

Mailed copy to Claude I. Parker, Atty. for Plf.
12-31-42. T. H.

[Endorsed]: Filed Dec. 31, 1942. [41]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

Defendant and appellant requests that the complete record and all the proceedings and evidence in the above-entitled action be incorporated in the record on appeal, including the following:

1. Plaintiff's complaint, together with exhibits thereto attached.
2. Defendant's answer.
3. Stipulation of facts.
4. The trial Court's minute order of September 26, 1942, ordering findings and conclusions of law in favor of the plaintiff.
5. Findings of fact and conclusions of law, dated and filed October 3, 1942.
6. Judgment dated and entered October 3, 1942.
7. Notice of appeal by defendant, dated and filed December 31, 1942. [42]
8. Order, dated February 8, 1943, extending time to docket cause on appeal to and including the 20th day of February, 1943.
9. This designation of portions of the record to be contained in the record on appeal.

Dated February 12, 1943.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States At-
torney.

EDWARD J. O'CONNOR,
Assistant United States At-
torney.

By EDWARD J. O'CONNOR,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed Feb. 12, 1943. [43]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California—ss.

Helen L. Cure, being first duly sworn, deposes and says:

That (s)he is a citizen of the United States and a resident of Los Angeles County, California; that (his) (her) business address is 600 Federal Building, Los Angeles, California; that (s)he is over the age of eighteen years, and not a party to the above-entitled action;

That on February 12, 1943, (s)he deposited in the United States Mails in the Post Office at Tem-

ple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Defendant's Designation of Contents of Record on Appeal in the above-entitled action, addressed to Claude I. Parker, Esq., 808 Bank of America Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

(s) HELEN L. CURE,

Subscribed and Sworn to before me, this 12th day of February, 1943.

EDMUND L. SMITH,

Clerk, U. S. District Court,
Southern District of California.

[Seal] By GROVER C. GATES,
Deputy. [44]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD

Upon motion of defendant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 20th day of February, 1943.

Dated this 8th day of February, 1943.

LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed Feb. 8, 1943. [45]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD

Upon motion of defendant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 1st day of March, 1943.

Dated this 19th day of February, 1943.

J. F. T. O'CONNOR,

United States District Judge.

[Endorsed]: Filed Feb. 20, 1943. [46]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 46, inclusive contain full,

true and correct copies of Complaint for the Recovery of Income and Excess Profits Taxes Illegally Assessed and Collected; Answer; Stipulation of Facts; Minute Order and Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Defendant's Designation of Contents of Record on Appeal and Two Orders Extending Time to Docket Appeal which constitute the record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of the said District Court this 26th day of February, A. D. 1943.

[Seal] EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Deputy Clerk.

[Endorsed]: No. 10379. United States Circuit Court of Appeals for the Ninth Circuit. Nat Rogan, Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California, Appellant, vs. The Starr Piano Company, Pacific Division, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed: February 27, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10379

NAT ROGAN, Collector of Internal Revenue,
Appellant,

vs.

THE STARR PIANO COMPANY,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The issues involved in this case are:

(1st) Whether the transaction involved herein was a reorganization, as defined by Section 112(g) (1)(2) and, hence, the gain exempt from recognition within the exemption provided in Section 112 (b)(4) of the Act.

(2nd) Whether the corporate entity of the Gennett Realty Company should be ignored.

(3d) Whether the transaction involved herein was a liquidation of the Gennett Realty Company, and the difference between the cost of the stock and the property of the company received represents taxable gain within the provisions of Section 115 (c) of the Revenue Act of 1934.

Appellant's contentions are: The appellant, Nat Rogan, hereby states that in his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered against him in the above-entitled case on October

3, 1942, for \$73,557.08, plus interest from March 3, 1937, he intends to rely upon the following points:

I.

The trial court erred in concluding that plaintiff was entitled to recover said sum of \$73,557.08, plus interest.

II.

The trial court erroneously found and concluded that the plaintiff recognized no taxable gain in the year 1934 through the liquidation of plaintiff's wholly owned subsidiary, Gennett Realty Company, in the year 1934.

III.

The evidence introduced in the trial court showed that taxable gain was realized by plaintiff through said liquidation; that the Commissioner of Internal Revenue correctly determined that said gain was taxable income to plaintiff in 1934; and that the inclusion of said sum of taxable income for the year 1934 made plaintiff liable for payment of the income and excess profits taxes which were paid by plaintiff and which plaintiff sought to recover in this action.

IV.

The trial court erred in entering judgment for the plaintiff and in failing to enter judgment for the defendant herein.

Appellant states that the entire record is necessary for the proper consideration of the points relied upon, but that the parts of the record especially necessary for consideration are pages 17 to

32 of said record, on which the stipulation of facts which constituted all of the evidence of the case is set forth.

Dated: February 27, 1943.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States At-
torney.

EDWARD J. O'CONNOR,
Assistant United States At-
torney.

By EDWARD J. O'CONNOR,
Attorneys for Appellant.

[Endorsed]: Filed March 1, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
DEEMED NECESSARY FOR CONSIDERA-
TION ON APPEAL.

Pursuant to Rule 19-6 of this Court, appellant designates the parts of the Record which he thinks necessary for the consideration of the points listed in his Statement of Points on which he intends to rely, filed concurrently herewith, and the parts which he desires to have printed, to wit:

Documents	Pages of Certified Record
1. Name and address of attorneys.....	1
2. Complaint, including exhibit attached.....	2
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4. Minute Order and Memorandum Deci- sion	35
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10. Stipulation of Facts, with Exhibits A, B, and C	17, 23, 29, 32
11. Statement of Points on which appellant intends to rely	
12. This Designation	

Dated: February 27, 1943.

LEO V. SILVERSTEIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States At-
torney.

EDWARD J. O'CONNOR,
Assistant United States At-
torney.

By EDWARD J. O'CONNOR,
Attorneys for Appellant.

[Endorsed]: Filed Mar. 1, 1943. Paul P. O'Brien,
Clerk.

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No. 10279.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NAT ROGAN, Collector of Internal Rvenue for the Sixth
Internal Revenue Collection District of California,

Appellant,

vs.

THE STARR PIANO COMPANY, PACIFIC DIVISION,
a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California.

BRIEF FOR THE APPELLANT.

Opinion Below.

The memorandum opinion of the District Court [R. 41-42] is unreported.

Jurisdiction.

This is an appeal from the judgment by the United States District Court, Southern District of California, rendered October 3, 1942, in favor of the plaintiff for \$73,557.08, plus interest, income and excess profits taxes for the year 1934. [R. 45-46.] Appellee's complaint

sought recovery from appellant, Collector of Internal Revenue, of corporation income and excess profits taxes and interest for 1934 assessed against and paid to him by the Starr Piano Company, Pacific Division, a corporation, in the sum of \$73,557.08, together with interest from the date of payment. [R. 2-9.] Appellee alleged that a claim for refund was filed on August 18, 1939, and disallowed by the Commissioner of Internal Revenue on September 20, 1940. [R. 8.] Jurisdiction was vested in the United States District Court under Section 24, Fifth of the Judicial Code. Notice of appeal was filed December 31, 1942. [R. 46, 47.] Jurisdiction is conferred upon this Court by Section 128(a) of the Judicial Code, as amended.

Question Presented.

Whether the taxpayer in 1934 realized taxable gain through the liquidation of its wholly owned subsidiary.

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in the Appendix, *infra*, pages 19-22.

Statement.

The relevant facts in the case, all of which were stipulated, may be briefly summarized as follows:

In May, 1922, taxpayer caused the organization of the Gennett Realty Company under the laws of California, for the purpose of holding legal title to two 99 year leases previously acquired by the taxpayer as lessee. [R. 20-21.]

At all material times the taxpayer owned all of Gennett's stock except qualifying shares. [R. 21.] In 1922, Gennett issued bonds of \$200,000 against the property and constructed a building out of the proceeds. [R. 21.] In 1922, 1923 and 1924, the taxpayer and Gennett as lessors sublet the property. [R. 21-22.] During all of its existence Gennett had no office separate from the taxpayer and had no bank account and no assets except the leases. [R. 22.] Its officers and directors were employees of the taxpayer actively engaged in carrying on the latter's activities. Its bookkeeping was done by the taxpayer's employees and its indebtedness paid by the taxpayer which credited its accounts for the indebtedness paid. [R. 22.] Rentals due Gennett under the sub-leases were collected by a Los Angeles bank as trustee for Gennett and the bank as trustee provided for retirement of the bonds and payment of interest on the same. [R. 22-23.]

For the years 1922, 1923 and 1924, the taxpayer and Gennett filed separate income tax returns. For the years 1925 to 1933, inclusive, consolidated returns were filed. [R. 23.] In 1934, taxpayer transferred accounts receivable to Gennett and the latter collected part of these accounts and turned the rest of them back to the taxpayer. Gennett carried on no other activities except those mentioned. [R. 23.]

In July and August, 1934, Gennett and the taxpayer merged under the laws of California. [R. 23.] Pursuant to the merger agreement which became effective August 1, 1934, all of Gennett's assets became vested in the tax-

payer [R. 29], and the taxpayer assumed all of its liabilities. [R. 31.] The stock of Gennett was surrendered to taxpayer's secretary for cancellation as provided in the merger agreement. [R. 31.]

The Commissioner of Internal Revenue determined that taxable gain resulted to the taxpayer through the acquisition of Gennett's assets and assessed income and excess profits taxes for the year 1934, based upon such gain. [R. 26.] It is stipulated that if such gain is recognizable for tax purposes, taxpayer is not entitled to recover while if such gain is not recognizable for tax purposes judgment should be in favor of the taxpayer. [R. 26.]

Statement of Points to Be Urged.

Appellant urges that the District Court erred in concluding (1) that taxpayer was entitled to the benefit of Section 112(b) (4), Revenue Act of 1934, and that gain resulting through the acquisition of Gennett's assets was not taxable in such year, and (2) that the entity of the Gennett Realty Company should be disregarded and ignored for tax purposes.

Summary of Argument.

Taxable gain resulted to taxpayer in 1934 measured by the difference between the fair market value of the assets acquired under the merger and the basis of the stock of the subsidiary which taxpayer surrendered and cancelled. This gain arose from a distribution in complete liquidation of taxpayer's subsidiary and was taxable under Section 115(c), Revenue Act of 1934. The case does not fall within the exceptions provided in Section 112(b) (4), Revenue Act of 1934. There was no exchange of property solely for stock or securities in *another* corporation a party to the reorganization. Gain is not exempt from taxation merely because a merger is effected under Section 112(g) (i) (A), Revenue Act of 1934. Such gain is taxable unless it arises from one of the nontaxable exchanges enumerated in Section 112. There was no such exchange here.

There are no legal grounds for ignoring the corporate entity of the subsidiary in determining the tax effect of the merger. It was not until the liquidation of the subsidiary in 1934 that any claim was made that the corporations were not separate entities. Separate returns were filed in some years and in others consolidated returns were filed. Taxpayer cannot now be heard to say the corporate entity of the subsidiary should be disregarded. Furthermore, the functions and activities of the subsidiary were more than nominal or passive. It served a definite corporate purpose and had definite activities to perform separate and apart from the activities of the taxpayer.

ARGUMENT.

Introductory.—The undisputed evidence shows that in 1934 pursuant to a statutory merger under the laws of California, the taxpayer acquired the assets of the Gennett Realty Company, its subsidiary [R. 29] and assumed its liabilities, taxpayer surrendering its stock in the subsidiary for retirement and cancellation. [R. 31.] The issue is whether the Commissioner properly recognized gain from the transaction measured by the difference between the value of the assets received by taxpayer and the basis for the stock of Gennett. There is no controversy as to either the basis for the stock, the value of the assets received by the taxpayer or the computation of the amount due if gain is recognizable. [R. 26.] The lower court held [R. 41-42] there was a reorganization under Section 112(g) (1) of the Revenue Act of 1934 (Appendix, *infra*), because of the statutory merger; that because taxpayer owned all of Gennett's stock it was not necessary that Gennett's property should be exchanged for stock in *another* corporation and that upon the surrender and cancellation of the stock taxpayer became entitled to the full benefits of Section 112(b) (4), Revenue Act of 1934. (Appendix, *infra*.) The court further stated [R. 42] that Gennett had no separate corporate existence for tax purposes and that its corporate entity should be entirely disregarded. There was no nontaxable exchange under Section 112, hence it is our contention the taxpayer realized taxable gain upon the merger because of the express provisions of Section 115(c), Revenue Act of 1934 (Appendix, *infra*); and that the corporate entity of Gennett cannot be disregarded.

I.

Taxpayer Received Taxable Gain Through the Distribution in Complete Liquidation of Its Subsidiary.

Section 115(c), Revenue Act of 1934, provides that amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for stock. The gain or loss to the distributee resulting from such exchange is determined under Section 111, Revenue Act of 1934, but is recognized to the extent provided in Section 112, Revenue Act of 1934.

Here there was clearly a liquidation within the meaning of Section 115(c) which made the gain therefrom taxable. *Gutbro Holding Co. v. Commissioner*, 47 B. T. A. 374; *Frelmort Realty Corp. v. Commissioner*, 29 B. T. A. 181; *Ward M. Canaday, Inc. v. Commissioner*, 29 B. T. A. 355, affirmed, 76 F. 2d 278 (C. C. A. 3d), certiorari denied, 296 U. S. 612. The reason for taxing gains resulting from distribution in corporate liquidation as provided in Section 115(c) had its origin in Section 201(c), Revenue Act of 1924, c. 234, 43 Stat. 253. As stated by the Senate Finance Committee, in reference to that section, S. Rep. No. 398, 68th Cong., 1st Sess., pp. 11-12 (1939-1 Cum. Bull. (Part 2) 266, 274), "A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof." The money or property the stockholder receives differs from the stock interest it previously held and the gain realized is therefore taxable upon the acquisition of this different interest. *United States v. Siegel*, 52 F. 2d 63 (C. C. A. 8th); *Burnet v. Riggs Nat. Bank*, 75 F. 2d 980 (C. C. A. 4th).

The following cases hold that either gains or losses are recognizable upon a liquidation by a parent of its wholly

owned subsidiary. *Burnet v. Aluminum Goods Co.*, 287 U. S. 544 (loss); *Burnet v. Riggs Nat. Bank*, 57 F. 2d 980 (C. C. A. 4th) (loss); *Gutbro Holding Co. v. Commissioner*, 47 B. T. A. 374 (gain); *Frelmort Realty Corp. v. Commissioner*, 29 B. T. A. 181 (gain); *Trenton Oil Co. v. United States*, 41 F. Supp. 887 (E. D. Mich.), affirmed, 122 F. 2d 1023 (C. C. A. 6th) (gain); *Ward M. Canady, Inc. v. Commissioner*, 76 F. 2d 278 (C. C. A. 3d) (gain); *France Co. v. Commissioner*, 88 F. 2d 917 (C. C. A. 6th), certiorari denied, 302 U. S. 699 (gain); *Cerro De Pasco Copper Corp. v. United States*, 13 F. Supp. 633 (C. Cls.), certiorari denied, 298 U. S. 686 (gain).

In *Trenton Oil Co. v. Commissioner*, *supra*, taxpayer acquired the assets of its subsidiary and surrendered its stock for cancellation. This was not pursuant to a statutory merger but otherwise the facts are similar to those in the case at bar. The District Court held there was no reorganization under Section 112(i), Revenue Act of 1928, but that even if there had been the case did not fall within the exceptions provided in Section 112(b) (4). The court further held there was a liquidation under Section 115(c), Revenue Act of 1928. The District Court was affirmed on appeal.

In *Gutbro Holding Co. v. Commissioner*, 47 B. T. A. 374, there was a statutory merger of the corporation and its subsidiary under the laws of New Jersey and the same question was involved as in the case at bar. The Board of Tax Appeals stated (pp. 380-381):

All of the assets of the subsidiary corporation did pass to the parent, petitioner, together with all its contractual rights and liabilities, in exchange for petitioner's stock in the parent. The stock was can-

celed. It filed its "Final Return" for Federal income and excess profits tax purposes. Petitioner took its name. The agreement of merger or consolidation which was carried out provided that the existence of the subsidiary should cease except in so far as its continued life was made necessary by statute or for the purposes of that agreement. Neither its continued existence nor any reason therefor is established. The record does not show that it was not dissolved. We think it was in fact liquidated. See *Ward M. Canaday, Inc.*, 29 B. T. A. 355; *affd.*, 76 Fed. (2d) 278; *certiorari denied*, 296 U. S. 612; *Frelmort Realty Corporation, supra*.

Moreover, whether the acquisition of the assets of its subsidiary by the petitioner was taxable is not controlled by the law of New Jersey, under the jurisdiction of which the statutory merger or consolidation occurred. This must be resolved under the Federal law. *Frelmort Realty Corporation, supra*. Section 115(c) of the Revenue Act of 1934 is determinative. That section, without qualification or limitation, requires that the recognized gain or loss to the distributee from a distribution in liquidation shall be computed under section 112. That section, we repeat, similarly categorically includes "a statutory merger or consolidation" within the definition of reorganization. In our opinion Congress thus clearly indicated that for Federal income tax purposes the present acquisition of the assets of its subsidiary by petitioner in a statutory merger or consolidation was a distribution in liquidation under section 115(c). Cf. *Anna V. Gilmore, supra*. The fact that petitioner received the assets of its subsidiary in connection with the statutory merger or consolidation is of no more significance in construing this section than it

was in constructing section 112. It follows under section 115(c), *supra*, that, since petitioner is not relieved from tax by any of the nonrecognition provisions of section 112, it was taxable, as determined by respondent, under section 115(c), *supra*. *Trenton Oil Co. v. United States, supra*.

The evidence in the case at bar clearly shows that taxpayer acquired the assets under a liquidation pursuant to Section 115(c). Liquidation occurs when the assets, rights and liabilities of the merged corporation pass to the surviving corporation. *Guild v. Commissioner*, 19 B. T. A. 1186; *Frelmort Realty Co. v. Commissioner, supra*; *Gutbro Holding Co. v. Commissioner, supra*.

Under Section 112(g) (1) (A), a statutory merger is a reorganization. While in the case at bar there was a statutory merger this is not enough to entitle the taxpayer to exemption from the admitted gain under Section 112. *National Bank of Commerce of Seattle v. Commissioner*, 40 B. T. A. 72, affirmed, 115 F. 2d 875 (C. C. A. 9th). Taxpayer must bring itself within one of the exceptions to the general rule which is prescribed in Section 112, before it is entitled to postpone taxation of the gain.

In *United States v. Hendler*, 303 U. S. 564, the Supreme Court stated (pp. 566-567):

Section 112 provides no exemption for gains—resulting from corporate “reorganization”—neither received as “stocks or securities,” nor received as “money or other property” and distributed to stockholders under the plan of reorganization. * * *

Since this gain or income of \$534,297.40 of the Hendler Company was neither received as “stock or securities” nor distributed to its stockholders “in

pursuance of the plan of reorganization" it was not exempt and is taxable gain as defined in the 1928 Act. This \$534,297.40 gain to the taxpayer does not fall within the exemptions of Section 112. * * *

See *Trenton Oil Co. v. United States*, 41 F. Supp. 887 (E. D. Mich.), affirmed, 122 F. 2d 1023 (C. C. A. 6th); 2 Paul & Mertens, Law of Federal Income Taxation, Sec. 17.47.

The only exception involved here is that provided in Section 112(b) (4) which provides that (1) where a reorganization is effected and (2) where there is an exchange of property for stock in *another* corporation, the gain upon the exchange is not to be recognized. Here there was no exchange of property for stock in *another* corporation and the case is clearly without the provisions of the section.

The lower court cited no authorities to support its decision [R. 41-42], that under the circumstances the taxpayer was entitled to the full benefits of Section 112(b) (4). The decisions are to the contrary. *Gutbro Holding Co. v. Commissioner*, *supra*; *Frelmort Realty Co. v. Commissioner*, *supra*; *Trenton Oil Co. v. United States*, *supra*; *France Co. v. Commissioner*, *supra*.

Furthermore, at the time of the merger in the case at bar the amendment to Section 112(b), Revenue Act of 1934, by Section 110, Revenue Act of 1935, c. 829, 49 Stat. 1014, was not effective. The amendment provides for nonrecognition of gains and losses through liquidation by a parent corporation of its subsidiary, thus changing the law applicable here. But by its own terms the amendment was not applicable for Congress specifically provided, it shall not apply to any liquidation, if any distribution

in pursuance thereof has been made before the date of the enactment of the Revenue Act of 1935, which was August 30, 1935. See Section 112(b) (6), Revenue Act of 1936, c. 690, 49 Stat. 1648. Though it may be unfortunate that taxpayer did not await until the amendment became effective to effectuate this merger the fact remains it can derive no advantage from the amendment because it was not in effect on the date of the merger.

In order for any taxpayer to take advantage of any of the exemptions under Section 112, it must bring itself clearly within the terms provided in the exceptions. *Helvering v. Southwest Corp.*, 315 U. S. 194. See also Regulations 86, Article 112(a)-1 (Appendix, *infra*).

The transactions did not fall within Section 112(b) (4) as clearly shown by the wording of this subsection. Gain was therefore taxable as provided in Section 112(a), Revenue Act of 1934.

II.

There Are No Valid Grounds for Ignoring the Corporate Entity of the Gennett Realty Company.

The court below was of the view that the facts warranted the ignoring of Gennett's corporate entity. Speaking of Gennett the court stated [R. 42] that it had no substantial separate existence apart from the parent; that its sole object was to hold legal title to certain leaseholds; that during its entire existence with the exception of the years 1922, 1923, 1924 and the year of the merger, 1934, the subsidiary and the taxpayer filed consolidated corporate income and franchise tax returns, and that for these reasons the parent corporation should not be charged with any gain on the acquisition of the assets of the subsidiary through the statutory merger. The lower court

has not enumerated all of Gennett's activities. The evidence shows that Gennett was organized to take title to two 99 year leases [R. 20-21]; that after acquiring the leases it sublet the property to other corporations. [R. 21-22.] In 1922 Gennett issued bonds of \$200,000 and raised funds through the bond issue to construct a building on the Pelton lease. The building was constructed out of the funds so raised. [R. 21.] While the evidence does not detail the work that was done in negotiating the bond issue and selling the bonds, planning and constructing the building and handling contracts and other work incident thereto, the corporation was certainly not inactive during these years and cannot be regarded as having no duties or activities or as being a mere sham. The evidence shows that separate federal tax returns were filed during the years 1922, 1923 and 1924, and consolidated returns during the later years except 1934. [R. 23.] During all the years involved rents from subleases were collected by Gennett's trustee and held in account for Gennett. Taxpayer had nothing to do with these rentals or their collection. Gennett took care of interest due on the bonds as well as the retirement of the bonds, all of which was handled by a bank as its agent. [R. 22-23.] Gennett was the obligor on the bonds not the taxpayer. [R. 21.]

In 1934 the taxpayer used Gennett as collecting agent for some of its accounts. Those that were not collected were turned back to taxpayer. [R. 23.] Gennett was organized for a specific purpose. Furthermore, the taxpayer used the separate entity by filing separate tax returns during the years of the greatest activity on the part of Gennett. When it desired to file consolidated returns these were filed. Gennett continued at all times to serve a definite purpose. It was at all times a separate corporation, and had been legally organized with specific

duties to perform. It continued as such until after the merger. It is well settled that corporations within an affiliated group are separate taxpayers and that a wholly owned affiliate is not identical with its parent for tax purposes. *Woolford Realty Co. v. Rose*, 286 U. S. 319; *Commissioner v. General Gas & Elec. Corp.*, 72 F. 2d 364 (C. C. A. 2d); *Commissioner v. Ben Ginsburg Co.*, 54 F. 2d 238 (C. C. A. 2d); *Delaware & Hudson Co. v. Commissioner*, 65 F. 2d 292 (C. C. A. 2d). Taxpayer caused this subsidiary to be created and after securing the desired results caused it to be dissolved. The subsidiary served a purpose during its life and having used it taxpayer must also bear the tax burdens imposed by Congress. It cannot choose to take advantage of the corporate entity for one purpose and have the entity disregarded for another. In *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 415, a corporation transferred its stock to its sole stockholder and the question arose whether this resulted in a loss. The taxpayer claimed the corporate entity should be disregarded. The Supreme Court held that the taxable entity should not be ignored and that the loss was recognizable for tax purposes. The court stated (p. 419):

Having enjoyed the benefits which resulted from its separate existence, it seeks to perpetuate those benefits and asks that the separate existence and tax liability of the petitioner and its single stockholder be overlooked only with respect to transactions which take place between them. That this is an afterthought is plainly evidenced by the action of petitioner in claiming a deduction upon this same transaction when it believed a deductible loss had been sustained. * * *

“The fact is that petitioner did have a separate legal existence with privileges and obligations entirely sep-

arate from those of its stockholders. The fact that it had only one stockholder seems of no legal significance. *Cannon Mfg. Co. v. Cudahy Co.*, 267 U. S. 333."

In *Higgins v. Smith*, 308 U. S. 473, the Supreme Court held that even where a taxpayer had used a nominal or fictitious corporation for purposes of tax advantage, it could not later have the corporate entity ignored when ignoring the entity would work to its advantage.

The court stated (p. 477):

A taxpayer is free to adopt such organization for his affairs as he may choose and having elected to do some business as a corporation, he must accept the tax disadvantages.

We have that situation in the case at bar. Here the taxpayer has freely made use of the tax benefits prescribed by Congress, exercised the elections as to filing consolidated or separate returns and having done so cannot now take a different position when recognition of the entity redounds to its disadvantage. *Higgins v. Smith*, *supra*. This question was involved in *Texas-Empire Pipe Line Co. v. Commissioner*, 127 F. 2d 220 (C. C. A. 10th), affirming 42 B. T. A. 368. The evidence in that case showed that the only legitimate purposes of the subsidiary were to acquire power of eminent domain in Illinois and reduce tax liability by filing a separate return for 1932. It was held that the transfer of all of the subsidiary's assets to the parent was a liquidating dividend and taxable as such and that taxpayer having elected to organize the subsidiary for legitimate business purposes must accept the attendant tax disadvantages. See also *Atlantic Refining Co. v. United States*, 46 F. Supp. 891 (C. Cls.).

In the lower court the taxpayer relied principally on the case of *Southern Pacific Co. v. Lowe*, 247 U. S. 330. That case is not in point. It involved the Income Tax Act of October 3, 1913, and the question involved was whether dividends which were declared and paid after the effective date of the Sixteenth Amendment out of a surplus which accrued prior to the effective date of the amendment were taxable income to the wholly owned subsidiary receiving the dividends. The evidence showed that the recipient corporation was a separate corporate entity but in reality it had control and possession of the dividends prior to the effective date of the Sixteenth Amendment and under the facts in the case received the dividends before the amendment became effective. Consequently the dividends were not taxable income. The Supreme Court stated (pp. 338-339):

Under the circumstances, the entire matter of the declaration and payment of the dividends was a paper transaction to bring the books into accord with the acknowledged rights of the Southern Pacific; and so far as the dividends represented the surplus of the Central Pacific that accumulated prior to January 1, 1913, they were not taxable as income of the Southern Pacific within the true intent and meaning of the Act of 1913.

The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been raised. * * *

This case is referred to by the Supreme Court in *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 415, where the court stated (p. 420):

Southern Pacific Co. v. Lowe, *supra*, and *Gulf Oil Corp. v. Lewellyn*, *supra* (the latter covered in prin-

ciple by the first), cannot be regarded as laying down any general rule authorizing disregard of corporate entity in respect of taxation. These cases presented peculiar situations and were determined upon consideration of them. In the former this court said [p. 338]—"The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the identity of a controlling stockholder with his corporation has been raised. * * *"

Taxpayer also relied on the case of *Inland Development Co. v. Commissioner*, 120 F. 2d 986 (C. C. A. 10th). The court stated (p. 988):

It is well settled that in ordinary circumstances, a corporation and its stockholders, whether one or more, are deemed separate entities, and generally that apartness is preserved when dealing with questions relating to taxes. * * *

But it is equally well settled that extraordinary circumstances sometimes exact the disregard of such separateness of entity in the solution of problems relating to taxes. * * *

The unusual circumstances in that case were that the subsidiary owned one oil lease; that the expenses of drilling and operating wells were all paid by the parent company which directly received all income from the lease. Since the parent company received the income the mere fact that this income appeared on the subsidiary's books as dividends paid the parent did not alter the real fact that the income was received from the sale of oil and not as dividends.

Taxpayer also relied on the case of *United States v. Brager Building & Land Corp.*, 124 F. 2d 349 (C. C. A. 4th). In that case the sole purpose of the subsidiary

was to act as a conduit for legal title of property. It was merely the agent of the stockholders in receiving income and the income it received was held to belong to the partnership. While that case seems distinguishable on the facts, nevertheless in so far as it conflicts with the decisions above, we submit the decision is erroneous.

We therefore respectfully urge that under the facts in the case at bar the corporate entity of the Gennett Realty Company should not be disregarded in determining the tax effect of the merger.

Conclusion.

We respectfully urge that the judgment of the District Court be reversed.

Respectfully submitted,

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April, 1943.

APPENDIX.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) GENERAL RULE.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) EXCHANGES SOLELY IN KIND.—

* * * * *

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in *another* corporation a party to the reorganization.

* * * * *

(g) DEFINITION OF REORGANIZATION.—As used in this section and section 113—

(1) The term “reorganization” means (A) a statutory merger or consolidation, * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * *

(c) DISTRIBUTIONS IN LIQUIDATION.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117(a), 100 per centum of the gain so recognized shall be taken into account in computing net income. * * *

SEC. 702. EXCESS-PROFITS TAX.

(a) There is hereby imposed upon the net income of every corporation, for each income-tax taxable year ending after the close of the first year in respect of which it is taxable under section 701, an excess-profits tax equivalent to 5 per centum of such portion of its net income for such income-tax taxable year as is in excess of 12½ per centum of the adjusted declared value of its capital stock (or in the case of a foreign corporation the adjusted declared value of capital employed in the transaction of its business in the United States) as of the close of the preceding income-tax taxable year (or as of the date of organization if it had no preceding income-tax taxable year) determined as provided in section 701. If the income-tax taxable year in respect of which the

tax under this section is imposed is a period of less than 12 months, such adjusted declared value shall be reduced to an amount which bears the same ratio thereto as the number of months in the period bears to 12 months. For the purposes of this section the net income shall be the same as the net income for income tax purposes for the year in respect of which the tax under this section is imposed.

(b) All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall, insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

Treasury Regulations 86 (1934 Ed.):

ART. 112(a)-1. *Sales or exchanges.* The extent to which the amount of gain or loss, determined under section 111, from the sale or exchange of property is to be recognized is governed by the provisions of section 112. The general rule is that the entire amount of such gain or loss is to be recognized.

* * * * *

The exceptions from the general rule requiring the recognition of all gains and losses, like other exceptions from a rule of taxation of general and uniform application, are strictly construed and do not extend either beyond the words or the underlying assumptions and purposes of the exception. Nonrecognition is accorded by the Act only if the exchange is one

which satisfies both (1) the specific description in the Act of an excepted exchange, and (2) the underlying purpose for which such exchange is excepted from the general rule. The exchange must be germane to, and a necessary incident of, the investment or enterprise in hand. The relationship of the exchange to the venture or enterprise is always material, and the surrounding facts and circumstances must be shown. As elsewhere, the taxpayer claiming the benefit of the exception must show himself within the exception.

* * * * *

ART. 112(g)-1. *Purpose and scope of exception of reorganization exchanges.*— * * * In order to exclude transactions not intended to be included, the specifications of the reorganization provisions of the law are precise. Both the terms of the specifications and their underlying assumptions and purposes must be satisfied in order to entitle the taxpayer to the benefit of the exception from the general rule.
* * *

No. 10379

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NAT ROGAN, Collector of Internal Revenue for the Sixth
Internal Revenue Collection District of California,
Appellant,

vs.

THE STARR PIANO COMPANY, Pacific Division, a corpora-
tion,
Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California.

BRIEF FOR APPELLEE.

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FILED

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III.

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No. 10379

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NAT ROGAN, Collector of Internal Revenue for the Sixth
Internal Revenue Collection District of California,

Appellant,

vs.

THE STARR PIANO COMPANY, Pacific Division, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California.

BRIEF FOR APPELLEE.

Opinion Below.

The opinion of the District Court [R. 41-42] is unreported.

Jurisdiction.

This is an appeal from the judgment by the United States District Court, Southern District of California, rendered October 3, 1942, in favor of the plaintiff for \$73,557.08 together with interest, income and profits

taxes for the year 1934 [R. 45-46]. Appellee's complaint sought recovery from appellant of corporation income and excess profits taxes and interest for 1934 assessed and paid to him by appellee in the sum of \$73,557.08, together with interest from date of payment [R. 2-9]. Appellee filed its claim for refund of income and excess profits taxes with the Commissioner of Internal Revenue on August 18, 1939 and said claim for refund was disallowed by the Commissioner of Internal Revenue on September 20, 1940 [R. 8, 18]. Appellee filed suit for recovery on March 20, 1941 [R. 2-15]. Jurisdiction was vested in the United States District Court under Section 24, fifth of the Judicial Code. Notice of appeal was filed December 1, 1942 [R. 46, 47]. Jurisdiction is conferred upon this Court by Section 128(a) of the Judicial Code, as amended.

Questions Presented.

Two questions are involved in this appeal.

1. Did appellee realize a taxable gain by reason of the fact that during the year 1934, pursuant to an agreement of merger and consolidation under the California statutes, appellee and its wholly owned subsidiary, Gennett Realty Company, both California corporations, were merged and consolidated?
2. Should the corporate entity of the Gennett Realty Company be disregarded?

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in the Appendix, *infra*, pages 1 to 7.

Statement.

The relevant facts in the case may be briefly summarized as follows:

Appellee is a corporation duly organized and existing under and by virtue of the laws of the State of California with principal place of business located in the County of Los Angeles [R. 2]. During the months of February and March, 1921, appellee entered into two ninety-nine year leases covering property situated in the City of Los Angeles [R. 20]. During the month of May, 1922, appellee caused the Gennett Realty Company, a corporation, to be incorporated under the laws of the State of California [R. 20]. The Gennett Realty Company was caused to be organized by appellee for the purpose of holding legal title to the two leases it had acquired in February and March, 1921 [R. 20-21]. On July 17, 1922, appellee transferred all its right, title and interest in the two leases aforesaid to Gennett Realty Company in exchange for all the capital stock of the latter [R. 21]. At all times during the existence of Gennett Realty Company appellee owned all its issued and outstanding capital stock [R. 21]. On August 1, 1922, the Gennett Realty Company as lessor, and appellee, as lessee, entered into a sublease of the property which appellee had transferred to Gennett Realty Company. The lease was for a term of 15 years [R. 21]. During the year 1922 Gennett Realty Company issued its bonds in the amount of \$200,000.00 for the purpose of raising funds to construct a building on one of the leases transferred to it by appellee. The funds were actually raised and a building constructed [R. 21]. On July 1, 1923, Gennett Realty Company and appellee as lessors, entered into a sublease for a period

of 25 years of the property on which the building aforesaid was constructed [R. 21]. On May 1, 1924, the sublease was extended to April 30, 1984. On May 1, 1924, Gennett Realty Company and appellee, as lessors, entered into a sublease of the other property which appellee had originally transferred to Gennett Realty Company, the term of the sublease being for a period of 60 years.

During the existence as a corporation of the Gennett Realty Company its directors and officers were persons employed by appellee and who were actively engaged in activities carried on by appellee. Gennett Realty Company had no office separate and apart from appellee. Gennett Realty Company had no assets except the leases transferred to it by appellee. Gennett Realty Company did not have a bank account. Gennett Realty Company had no employees other than its officers and directors who were employees of appellee. All bookkeeping of the Gennett Realty Company was done by an employee of appellee. All indebtedness of Gennett Realty Company was paid by check of the appellee. All rentals due Gennett Realty Company were collected by a Los Angeles bank as trustee [R. 22-23].

For the years 1922, 1923 and 1924 appellee and Gennett Realty Company filed separate corporate income tax returns. At all times during its existence, with the exception of the year 1934, Gennett Realty Company and appellee filed consolidated corporate income and franchise tax returns. During the year 1934 appellee transferred certain accounts to Gennett Realty Company to be collected in the name of Gennett Realty Company. Part of said accounts were collected in the name of Gennett Realty Company. The uncollected accounts were trans-

ferred back to appellee. Gennett Realty Company carried on no activities except as enumerated in this statement [R. 23].

During July and August, 1934 the Gennett Realty Company merged into appellee. The merger was made in compliance with the provisions of Division First, Part IV, Title 1, Chapter XIII of the Civil Code of California.

The merger agreement was approved by the Board of Directors of Gennett Realty Company, the shareholders of Gennett Realty Company, the Board of Directors of appellee and the shareholders of appellee on July 31, 1934. A certificate relating to the merger agreement was filed with the Secretary of State of the State of California on August 1, 1934 and the same certificate was filed with the County Clerk of the County of Los Angeles, in which county appellee had its principal place of business on August 10, 1934. A like certificate on the same dates was filed with the same officials on behalf of Gennett Realty Company [R. 23, 24, 25].

Pursuant to the statutory merger all the assets of Gennett Realty Company became vested in appellee and all liabilities of Gennett Realty Company were assumed by appellee. All shares of stock of Gennett Realty Company, by virtue of the merger agreement, were surrendered to and cancelled by appellee [R. 29-40].

The Commissioner of Internal Revenue determined that appellee derived a taxable gain incident to the receipt by appellee of property of Gennett Realty Company as a result of the statutory merger.

Summary of Argument.

The appellee realized no taxable gain by reason of the receipt of the assets of its subsidiary by operation of law pursuant to a statutory merger or consolidation. In the case of a merger or consolidation of independent companies the acquiring corporation realizes no income or gain through acquisition of assets, not because of any express statutory provision of Section 112, but because there is no gross income under Section 22(a) to a corporation from the acquisition of the capital funds with which it carries on business. A newly organized corporation realizes no income by acquiring assets for newly issued stock and a combination of assets and franchises of two corporations united and continuing by merger or consolidation cannot give rise to income to the continuing corporation.

Section 113(a)(7) of the Revenue Act of 1934, prescribing that the "basis" for assets acquired in connection with a reorganization, where an interest or control of 50% or more continues in the same persons, is the same as the basis for such assets in the hands of the transferor, adjusted only for loss or gain recognized to the transferor.

The underlying assumption of both the basis provisions and the non-recognition provisions is that the acquiring corporation receiving property in a statutory merger or consolidation realizes no gain thereby.

The law of the case is not changed by reason of the fact that the company which is merged was a subsidiary of the continuing company.

The same transfer of assets cannot constitute both a transfer by operation of law pursuant to a statutory merger or consolidation and a distribution in liquidation of the subsidiary. This is so because merger or consolidation is continuance of corporate life and liquidation is winding up or corporate death.

The fact that appellee made no formal exchange of stock for stock of the subsidiary does not change the nature of the transaction or give rise to taxable income. Appellee in legal effect exchanged stock as to which Section 112(b)(3) specifically provides that no gain shall be recognized. Under the merger agreement it was provided that no additional stock of appellee would be issued. The issuance of additional stock would have been a useless act as the stock of the subsidiary was owned 100 per cent by appellee and if stock was to be issued appellee would have to issue its own stock to itself.

The appellee in its capacity as a continuing corporation received the assets of the merged subsidiary by operation of law and in its capacity as a stockholder of the merged subsidiary either received stock in exchange for its stock or received nothing therefor.

The District Court, based upon substantial evidence, held that the corporate entity of the subsidiary should be ignored and this should not be disturbed by this Court.

The subsidiary, Gennett Realty Company, was a mere agent or instrumentality of appellee and by reason of the peculiar facts obtaining should be ignored and disregarded for tax purposes.

ARGUMENT.

I.

Appellee Realized No Taxable Gain by Reason of the Receipt of the Assets of the Subsidiary Pursuant to a Statutory Merger or Consolidation.

The fundamental question in this case is whether appellee acquired the assets of its subsidiary by operation of law as the continuing corporation resulting from a "statutory merger or consolidation" or whether it received such assets as a distribution in liquidation of the subsidiary to be treated as received in exchange for its stock in the subsidiary. It is the contention of appellee that the assets were received by operation of law in a statutory merger or consolidation and not as a distribution in liquidation and that such acquisition did not result in the receipt of income.

(a) Appellee Received the Assets of Its Subsidiary by Operation of Law, Pursuant to a Statutory Merger or Consolidation.

The record contains the text of the agreement of merger and consolidation [R. 27-40]. The stipulation of facts sets forth that the agreements were carried out in accordance with their terms [R. 23-25].

The agreements recite that appellee is the sole stockholder of the subsidiary and that the parent and subsidiary have agreed to reorganize and to carry out such reorganization by means of a statutory merger or consolidation in accordance with the provisions of the Civil Code of the State of California and that it is deemed to the best interests of each to merge the Gennett Realty Company into appellee and that appellee after such merger

shall be and become the surviving corporation as provided by the provisions of the Civil Code of the State of California.

Section 361 of the Civil Code is set forth in the Appendix and by recourse thereto there can be no question but that appellee acquired the assets by operation of law pursuant to Section 361, *supra* and that the agreement was made in conformity therewith.

(b) A Corporation Realizes No Income or Gain by Acquiring the Assets of a Subsidiary by Operation of Law Pursuant to a Statutory Merger or Consolidation. This Does Not Depend on Any Express Statutory Provision for Non-recognition of Gain.

Appellant contends that the receipt of assets by the continuing corporation, pursuant to a statutory merger or consolidation, gave rise to taxable gain unless some provision of Section 112 could be found which specifically provides that no gain should be recognized from such receipt of property. It is submitted that such contention is erroneous, for on general principles such an acquisition does not give rise to taxable gain. The reason that Section 112 contains no express provision to that effect is not that Congress intended that all such acquisitions should be taxed but that Congress recognized the established principle that where a corporation makes such a capital acquisition it realizes no taxable gain.

Nowhere in Section 112, or elsewhere in the statute, is there provision that either a newly organized corporation, a new consolidated corporation or a continuing merged corporation is not taxable upon receipt of the assets acquired upon its organization or reorganization. Appel-

lant's reasoning on this point would lead to the conclusion that any newly organized corporation, new consolidated corporation or continuing merged corporation receiving assets in connection with its organization or reorganization would be taxable thereon because unable to point to any applicable non-recognition provision of Section 112.

It is clear that a newly organized corporation does not realize income by acquiring assets or money for newly issued stock or as a paid-in surplus. The corporation is merely organized or created; it has not realized a gain; it has merely received capital funds from its stockholders. See Articles 22(a)-15 and 22(a)-16, Regulations 86 (1934) "Contributions to capital are, of course, not taxable as corporate income." *Carroll-McCreary Co., Inc. v. Commissioner*, 124 Fed. (2d) 303 (2d C. C. A. 1941).

By the same reasoning it follows that the combination of the assets and franchises of two corporations uniting for continuance cannot give rise to income to the continuing company, whether such company is a new corporation resulting from a consolidation or the continuing company in a merger. There is merely a joinder of the capital funds possessed by the two corporations in a union of the two corporations, all the franchises, rights and liabilities of which continue in the resulting corporation by operation of law.

No statutory provision is necessary to relieve such accession to corporate assets of income tax and this for the reason there is no gain or income within the meaning of Section 22(a) defining income. The corporation is not making a gain through sale, exchange or other disposition of assets. It is merely receiving capital funds with which to carry on business. There has never been any claim that

upon the merger or consolidation of previously independent corporations, the corporation acquiring assets realized any gain or income as the result of such acquisition.

That Congress recognized that a corporation realizes no gain by acquiring the assets of another corporation in connection with a reorganization is demonstrated by Section 113(a)(7) of the Revenue Act of 1934, providing for the "basis" for tax purposes of assets so acquired. Section 113(a)(7) provides:

"If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. * * *"

Obviously, if the value of the assets received by the acquiring company in a reorganization were used to measure income or gain to it, it should in all fairness be entitled to use such value as the "basis" for such assets for the future, but the statute does not contemplate such a possibility. The statute expressly provides for an increase of the prior basis of the assets by the amount of any gain recognized to the *transferor*, but makes no provision whatever for any adjustment of basis on account of gain to the *transferee*. The reason for this is that Congress recognized that although the *transferor* might in some cases be taxed on a gain based on what it received for the transfer of assets in connection with a reorganization, the ac-

quiring company could not be regarded as receiving income or realizing gain by the mere acquisition of assets in this way.

The underlying assumption of both the "basis" provision and the non-recognition provisions is that the company acquiring the assets of other corporations in connection with a reorganization will receive them in such manner as not to give rise to taxable income. For this reason, it is unnecessary to provide in Section 113(a)(7) for any adjustment of basis of assets on account of such a transaction and equally unnecessary to provide in Section 112 for the non-recognition of gain.

It follows that the acquisition by the continuing company of the assets of the merged or constituent companies pursuant to a statutory merger or consolidation does not give rise to any taxable gain to the continuing corporation.

(c) The Fact That the Merged Company Was a Subsidiary of the Company Continuing After the Merger Does Not Change the Nature or Tax Effect of the Acquisition of the Assets of the Subsidiary.

The fact that the company which is merged was a subsidiary of the continuing company prior to the merger does not change the nature or legal consequences incident to the acquisition of the merged company's assets. There can be no question concerning this where there is a consolidation of two companies. The result cannot be different between consolidations and mergers. California statute requires the same procedure incident to mergers and consolidations and this whether the merged company is a subsidiary or not. It is the position of appellee that for tax purposes the effect of the acquisition of the subsidiary assets through

a merger or consolidation is exactly the same as that of the acquisition of the assets of a wholly independent company in the same manner. In neither case does any gain to the continuing company result or accrue from such acquisition.

Section 113(a)(7) of the Revenue Act of 1934 demonstrates that this is the correct view. Under that section the appellee in this case is required to use as the basis of the subsidiary assets the same basis as such assets had in the hands of the subsidiary because it acquired such assets in connection with a reorganization, 100% control continued and no gain was recognized to the subsidiary, which received nothing for its assets.

The courts, in connection with cases involving the amortization of bond discount have held that where a subsidiary is merged into a parent corporation the parent does not acquire the assets of the subsidiary by purchase or by way of liquidation, but acquires such assets as a successor by operation of law pursuant to a merger or consolidation without break in the continuing corporate ownership of such assets.

In *Helvering v. Metropolitan Edison Co.* and *Helvering v. Pennsylvania Water & Power Co.*, 306 U. S. 522 (1939), the Supreme Court held that upon a statutory merger of a subsidiary into a parent corporation the continuing parent corporation was entitled to deduct unamortized discount and expense with respect to bonds which had been issued by the subsidiary. In that case, the Government conceded that upon a true merger or consolidation the successor stepped into the shoes of the merged subsidiary, but contended that the transactions under review were not true statutory mergers but were mere sales

by one corporation of all its assets to another which assumed the liabilities of the former. The Court held the transactions to be mergers under Pennsylvania law and not sales of assets and said at page 529:

“We are of opinion that a transfer without valuable consideration, with the intent that the transferor shall, as the statute provides, cease to exist, made in accordance with the statute, has all the elements of a merger and comes within the principle that the corporate personality of the transferor is drowned in that of the transferee. It results that the continuing corporation may deduct unamortized bond discount and expense in respect of the obligations of the transferring affiliate.”

It should be emphasized that these cases were mergers of subsidiaries into continuing parents.

The Circuit Court of Appeals for the Second Circuit in *New York Cent. R. Co. v. Commissioner*, 79 Fed. (2d) 247, cert. den. 296 U. S. 653, held that the merged company stepped into the place of the constituent corporations and said at page 249:

“The consolidated corporation does not succeed to the rights and liabilities of the constituent companies as a purchaser but as a successor by operation of law. See *Cortland Specialty Co. v. Commissioner*, 60 F. (2d) 937, 939 (C. C. A. 2); *Commissioner v. Oswego Falls Corp.* (C. C. A.) 71 F. (2d) 673, 676 (C. C. A. 2). The assets of the consolidated corporation have the same cost basis as they had when held by the old companies, and are subject to the lien of the bond issues. Hence the consolidated corporation will suffer a loss when it pays the bonds at par, and the regulations as to spreading this loss over the life of

the bonds should apply. They do not in terms confine discount deductions to the issuing corporation, and should not be construed to do so. If the new corporation cannot take the deduction, no one can, for the old companies sustained no loss when the consolidation was effected.”

Later the Court, at page 250, said:

“The principles above discussed as applicable in case of consolidation are equally applicable to merger.”

In *American Gas & Electric Co. v. Commissioner*, 85 Fed. (2d) 527, the Circuit Court of Appeals for the Second Circuit establishes the difference between the income tax effect of a successorship by operation of law pursuant to a statutory merger or consolidation where the corporate identities are held to continue and other transactions, even though non-taxable, where the corporate identity is not preserved. The Court stated at page 530:

“The situation in *New York Central R. Co. v. Commissioner*, 79 F. (2d) 247 (C. C. A. 2) and *Western Maryland R. Co. v. Commissioner*, 33 F. (2d) 695 (C. C. A. 4), was different. In each of those cases there was a consolidation of the corporations, and amortization was allowed for the life of the bonds on the ground that the consolidated corporation succeeded to the rights and liabilities of the constituent companies, not as a purchaser, but by operation of law. A merger will in general preserve corporate identity and continue the obligations against a successor company, which is treated as identical with the former obligor. *Cortland Specialty Co. v. Commissioner*, 60 F. (2d) 937, 939 (C. C. A. 2).”

The Circuit Court of Appeals for the Second Circuit in *General Gas & Electric Corporation v. Commissioner*, 98 Fed. (2d) 561, reversed 306 U. S. 530, wherein the Court stated at page 563:

“It is conceded that unamortized discount and expenses incurred in connection with the issue and sale of bonds are deductions available to the issuing corporation when it pays them off prior to maturity. See *Helvering v. Union Pacific R. Co.*, 293 U. S. 282, 55 S. Ct. 165, 79 L. Ed. 363; *Great Western Power Co. v. Commissioner*, 297 U. S. 543, 56 S. Ct. 576, 80 L. Ed. 853. It is also not disputed that such items are allowable deductions to a successor corporation which through merger or consolidation has carried forward the corporate identity of the issuing corporation and has succeeded by operation of law to its rights and liabilities. *American Gas & Elec. Co. v. Commissioner*, 2 Cir., 85 F. 2d 527; *New York Central R. Co. v. Commissioner*, 2 Cir., 79 F. 2d 247, certiorari denied 296 U. S. 653, 56 S. Ct. 370, 80 L. Ed. 465; *Western Maryland Ry. Co. v. Commissioner*, 4 Cir., 33 F. 2d 695. When, however, the successor corporation acquires the assets of the issuing corporation by purchase, rather than by a consolidation or merger, such deductions are not available. *American Gas & Elec. Co. v. Commissioner*, 2 Cir., 85 F. 2d 527; *American Gas & Elec. Co. v. United States*, 17 F. Supp. 151, Ct. Cl.; *Turner-Farber-Love Co. v. Helvering*, 62 App. D. C. 369, 68 F. 2d 416. Whether the transactions at bar are to be classed as mergers or as purchases is the issue in controversy.”

The Supreme Court reversed the decision above because of its conclusion, evidenced by its opinion in *Helvering v. Metropolitan Edison Co.*, 306 U. S. 522, that there was an

assumption of liabilities by operation of law and hence held that the amortization deduction should be allowed in accordance with the legal principles stated.

It is clear that if the acquisition of the assets of a subsidiary pursuant to a statutory merger or consolidation were in fact or effect a distribution in liquidation of the subsidiary giving rise to taxable gain or deductible loss, the continuing company would be a purchaser and not a successor by operation of law and the decisions above would have been exactly opposite of what they were in the cases which involved subsidiaries.

The decisions turn on the legal effect under state law of the succession by one corporation to the assets, franchises and business of another corporation pursuant to a statutory merger or consolidation. *Helvering v. Metropolitan Edison Co.*, 306 U. S. 522.

This Court has also held that in transactions constituting "reorganizations" under the Internal Revenue laws in which no gain or loss is recognized to the participating stockholders, the corporate identity continues so that the earnings and profits of the companies merged, consolidated or reorganized retain their status as earnings and profits in the hands of the continuing company. *U. S. v. Kauffmann*, 62 Fed. (2d) 1045. The Circuit Court of Appeals for the Second Circuit has held likewise in *Commissioner v. Sansome*, 60 Fed. (2d) 931.

In *Commissioner v. Kann*, 130 Fed. (2d) 797 (3rd C. C. A. 1942) a holding company was merged into its wholly owned subsidiary. The holding company owned nothing except the stock of the subsidiary and a small amount of cash. The Court held that the stockholders had realized

no taxable gain because they were exchanging stock of the parent for stock of the subsidiary pursuant to a statutory merger, a transaction falling within Section 112 (b) (3) of the Revenue Act of 1936, although the effect of the transaction on the stockholders was substantially the same as if the parent company had made a direct distribution of the subsidiaries shares in liquidation. The Court followed its decision in *Commissioner v. Gilmore's Estate*, 130 Fed. (2d) 791 where a holding company owning a minority interest in the stock of an operating company, the balance of the stock of which was owned by the stockholders of the holding company, merged into the operating company. This decision was followed on the same facts by Circuit Court of Appeals for the 5th Circuit in *Commissioner v. Webster's Estate*, 131 Fed. (2d) 426.

From the above it follows that the appellee, despite the parent and subsidiary relationship, stands in exactly the same position with respect to the acquisition of the assets of the merged company as though there had been no such prior relationship. It is a successor to the business, franchises, assets and liabilities of Gennett Realty Company by operation of law and carries forward the identity of the merged subsidiary which is drowned in the continuing company. The appellee no more realized income through the acquisition of the assets of the merged company which was its subsidiary than it would have if the merged company had previously been a wholly independent company.

II.

Appellee Did Not Receive the Assets of Gennett Realty Company as a Distribution in Liquidation or in Exchange for the Shares of That Company.

The appellant takes the view that the transaction was both an acquisition of assets by operation of law pursuant to a statutory merger or consolidation *and* a receipt of such assets as amounts distributed in complete liquidation of Gennett Realty Company in exchange for its stock. We maintain this to be error and that the finding that the assets of Gennett Realty Company were transferred pursuant to a statutory merger or consolidation precludes any holding that the same transfer of assets was a distribution in liquidation of Gennett Realty Company.

- (a) The Same Transfer of Assets Cannot Be Both a Transfer Pursuant to a True Statutory Merger or Consolidation and a Distribution in Liquidation of One of the Merging Companies. Merger or Consolidation Means Continued Corporate Life; Liquidation Means Winding Up, or Corporate Death, for the Liquidated Corporation.**

We have heretofore shown the legal and tax consequences which flow from the receipt of assets by the continuing company pursuant to a statutory merger or consolidation. The assets, franchises and liabilities of the merged corporation and all its functions persist in modified corporate form as a part of the united corporation. The continuing company has not acquired the assets by purchase. The assets are acquired by it by operation of law for the purpose of continuing in corporate ownership in combined

or united form. Under Section 113(a)(7) it must take over the transferor's basis for the assets. The corporate business continues in modified corporate form and is not terminated and wound up. Under California statute all rights of creditors and all liens on the property of the former corporations are preserved unimpaired and the merged corporation is deemed to continue in existence in order to preserve the same and all obligations, restrictions and duties attach to the consolidated corporation. The corporate identities of the merged corporations continue as a joint or consolidated whole. No distinction is made between consolidations and mergers.

In sharp contrast with the continuance of corporate business and identity by merger or consolidation is the "liquidation" of a corporation. The theory and purpose of liquidation are well indicated by Article 112(b)(6)-1, Regulations 94 (1936), which provides:

"A status of liquidation exists when the corporation ceases to be a going concern and its activities are merely for the purpose of *winding up* its affairs, *paying its debts* and *distributing* any remaining *balance* to its shareholders."

The definition of liquidation evidenced by the foregoing quotation is in exact accord with the effect of a liquidation under California law.

In *Wabash, St. Louis & Pacific Railway Company v. Ham*, 114 U. S. 587 (1885), earlier cases are cited and the principles stated as follows at page 595:

"But upon the consolidation, under express authority of statute, of two or more solvent corporations, the business of the old corporations is not wound up,

nor their property sequestrated or distributed, but the very object of the consolidation, and of the statutes which permit it, is to continue the business of the old corporations. Whether the old corporations are dissolved into the new corporation, or are continued in existence under a new name and with new powers, and whether, in either case, the consolidated company takes the property of each of the old corporations charged with a lien for the payment of the debts of that corporation, depend upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected."

It is accordingly incorrect for appellant to contend that the acquisition of the assets of a subsidiary corporation by a statutory merger or consolidation involving the continued corporate life and activity of both the participating companies may also be a distribution of such assets by the subsidiary in liquidation is conclusively shown by the vital distinctions between the two types of transaction.

On the complete liquidation and dissolution of a corporation the business of the corporation ceases, its corporate powers terminate except for the winding up of its affairs, its trustees in liquidation wind up its affairs, pay its debts and divide whatever is left among its stockholders by payment or appropriate bills of sale or deeds or other instruments of transfer, and its corporate existence terminates. Upon a merger or consolidation the business of the merged corporation continues, the successor corporation is vested with its franchises, rights and powers, its affairs are not wound up, its creditors continue with identical unimpaired rights against the continuing company, its assets are not distributed to its stockholders but pass by operation of law to the continuing company without need for bills of sale,

deeds or other instruments of transfer, and its corporate existence continues, drowned in or combined with that of the continuing company.

On the liquidation of a corporation its creditors have no claim against the stockholders except as transferees of the corporation's assets. But where a corporation is merged or consolidated with another the rights of creditors of the merged or constituent companies continue, unchanged in character, against the continuing company.

On the liquidation of a company which has issued bonds at a discount the corporate stockholder who receives its assets on liquidation is not entitled to deduct bond discount with respect to such bonds because the acquiring corporation is regarded as a purchaser of the assets and the corporate existence of the liquidated company has terminated. But a successor to a subsidiary company by a merger or consolidation is entitled to continue to deduct the bond discount with respect to such bonds, it is not regarded as a purchaser of the assets and the corporate identity of the merged company is preserved and continued in the continuing corporation.

On the liquidation of a corporation its accumulated earnings and profits disappear as such and do not become earnings and profits of any corporate shareholder who receives its assets on liquidation. But where a corporation is merged or consolidated with another, its accumulated earnings and profits become earnings and profits of the continuing company available for distribution as dividends.

Under the Revenue Act of 1934 if the assets of a corporation are distributed in liquidation to its stockholders, the basis for such assets in their hands for the future is

the fair market value of the assets at date of distribution since they are required to treat such assets as received in exchange for their stock and to account for loss or gain on this basis. Upon a merger or consolidation the assets acquired by the continuing company "in connection with a reorganization" have the same basis as they had in the hands of the transferor subject to adjustment only for any gain or loss recognized to the transferor. Whether or not in such a case the transferee nevertheless realizes a gain is the question involved in this case.

These fundamental differences result because a merger or consolidation is as different from a liquidation as continued corporate life is from corporate death. In both theory and legal effect they are diametrically opposed. We submit that the appellant errs when he contends that although the assets of Gennett Realty Company passed to appellee by operation of law pursuant to a true statutory merger or consolidation, nevertheless such assets were distributed by Gennett Realty Company as distributions in complete liquidation and were received by appellee in exchange for its stock in Gennett Realty Company.

The decision of the Board of Tax Appeals in *Frelmort Realty Corporation*, 29 B. T. A. 181 (1933), is readily distinguishable because although the transaction took the form of a merger in that case, it was in fact a liquidation of the subsidiary. The business of the subsidiary and the venture on which it had embarked had been substantially completed. The parties desired to have the business wound up and an accounting for gains or losses. The Board said at page 189:

"In the cases we have here, the evidence leaves no doubt that it was the intent of the parties interested

in Brown-Rochester to wind up its business. It had been formed for a particular purpose—to hold title to certain real estate—and upon disposition of the property there was obviously no further need for the corporation to exist as a separate entity. Consequently those in control decided to liquidate, and upon distribution of its assets to petitioner the liquidation was an accomplished fact.”

There was in the *Frelmort* case no true merger or consolidation, but merely a liquidation of a subsidiary company which was being wound up. In the present case the business of both corporations continued in combined corporate form.

Burnet v. Riggs Nat. Bank, 57 F. (2d) 980 (4th C. C. A., 1932), presents a similar situation. The Court held that the taxpayer was entitled to deduct a loss on the liquidation of a failing savings bank, the stock of which it had acquired a few months before to protect the general banking situation in the District of Columbia, even though the liquidation took place during a consolidated return period. The opinion states that the subsidiary was merged with the parent under an act of Congress but the facts show that liquidation of the failing bank was contemplated from the outset, and that the process of liquidation was under way before the transaction took place. The case was considered both by the Board of Tax Appeals and the Circuit Court of Appeals as a surrender by the taxpayer of the capital stock of its subsidiary in exchange for its assets. The question argued and decided was whether or not such a loss could be deducted where the liquidation took place during a consolidated-return period and the ef-

fect in determining the loss of the deduction in the consolidated return of the operating loss of the subsidiary.

These cases, properly viewed, are not, therefore, authority for the erroneous proposition that assets transferred pursuant to a true statutory merger of a subsidiary into a parent corporation may also be treated as distributions in liquidation of the subsidiary in exchange for its stock.

We do not contend that there may not be a liquidation of a corporation in connection with a transaction which may constitute a "reorganization" as defined in the Revenue Act. As pointed out in *Helvering v. Schoellkopf*, 100 F. (2d) 415 (1938), such a result may happen, particularly where the reorganization takes the form of a transfer by one corporation of all its assets to another in exchange for the distribution of stock of the transferee to the transferor's stockholders. Our contention is that the acquisition of assets by a successor corporation by operation of law pursuant to a true statutory merger or consolidation, cannot at the same time constitute a distribution in liquidation of the merged company falling within Section 115(c) even though the merged company was theretofore a subsidiary of the continuing company. In such a case the separate corporate existence of the merged company ceases, but it does not distribute its assets to its stockholders as distributions in liquidation; its assets pass to the successor corporation by operation of law, and its corporate identity continues drowned in and combined with that of the continuing company.

(b) The Fact That Appellee Could Have Acquired the Assets of Its Subsidiary in Liquidation Furnishes No Basis for Disregarding What Was Actually Done or For Treating the Merger as If It Were a Liquidation.

We are here dealing with a statutory merger. The question is whether the fact of the statutory merger can properly be disregarded merely because the merged company was a subsidiary of the continuing company; whether appellee may be taxed as if it had liquidated the subsidiary company because it might have done so, although it did not in fact do so.

Recent decisions of other Circuit Courts of Appeals dealing with cases of so-called “downstairs” mergers—merger of parent into subsidiary—clearly establish that the fact that the merger is between parent and subsidiary furnishes no basis for refusing to give effect to the tax consequences flowing from a statutory merger or consolidation, or for finding that one of the companies had in effect been liquidated because, in those cases, substantially the same result might have been accomplished by a liquidation.

In *Commissioner v. Gilmore's Estate*, 130 F. (2d) 791 (3rd C. C. A., 1942), the Court dealt with a case where a holding company, the assets of which were reduced to a minority interest of the stock of an operating company, merged with the operating company as the continuing company under the New Jersey statutes. The stockholders of the holding company already owned the majority of the stock of the operating company, and received the balance of such stock by the merger. The Court overruled arguments that the transaction was not a true statutory merger and held that the fact that the stockholders were in substantially the same position as though

there had been a liquidation of the parent company did not warrant treatment of the transaction as a liquidation of the holding company. The Court said at page 794:

“In this case we have two corporations established long before the transaction in question, an operating company and a holding company. They desire to get rid of the holding company. The shareholders of the holding company were the majority owners of the operating company. By reason of the plan chosen they received the shares they had theretofore held indirectly through the holding company. There was no conversion into cash on withdrawal. Rather, the entire history of the two corporations reveals that the interests obtained through the merger were to be continuing and the surviving corporation kept on doing business with no change in management or personnel after the merger. We have, then, a genuine transaction in the sense that it was operating upon the situation of the companies as they stood. We have the continuity of uninterrupted corporate existence of the merged company and the interest of all prior owners therein, except, of course, of the dropping out of the holding company. Are there further requirements?

“Argument for the Commissioner maintains that what has been done is still not enough. The result to be reached through this merger, it is said, could have been reached more directly by an out and out liquidation which, of course would have been taxable under Section 115(c). Granted that the elimination of the holding company as a subject for taxation was a legitimate business object, it does not follow that the method taken in getting rid of it is a tax-free method. We think this gets down to the proposition that if there are two ways of accomplishing a

legitimate business result, one of which clearly creates a taxable transaction, one is equally subject to tax liability if he chooses the other unless there is an adequate business reason for the particular method used. We do not think this is the rule of the statute, the Regulations, nor, as we read them, the decisions.”

The same Court reached the same result in the case of *Commissioner v. Bertha F. Kann*, 130 F. (2d) 797 (1942), where a parent company owning nothing except the entire capital stock of its subsidiary and a small amount of cash, merged with its subsidiary. The Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. Webster's Estate*, 131 F. (2d) 426 (1942), followed the *Gilmore* case in the case of another stockholder involving the same reorganization.

With respect to these cases the following statement appears in *Woodruff v. Commissioner*, 131 F. (2d) 429, 430 (5th C. C. A., 1942):

“It is true that the tax consequences of a transaction depend upon the substance of the transaction rather than the mechanics by which it is executed; but it is also true that, if a taxpayer has two legal methods by which he may obtain a desired result the method pursued is determinative for tax purposes without regard to the fact that different tax results might have attached if the alternative procedure had been followed.”

We submit that, in the light of these cases, there is no basis for the contention of appellant in the present case

that because of the prior patent and subsidiary relationship the assets of Gennett Realty Company should be treated as having been received as a distribution in liquidation despite the finding that they were received pursuant to a statutory merger or consolidation by operation of law.

It equally follows that such assets were not received "in exchange for" the stock of Gennett Realty Company. The decisions establish that the assets were received by operation of law in a continuing transaction and irrespective of the stock ownership by the parent company. There was neither a distribution in liquidation of, nor an exchange of stock for, the assets so acquired, either in legal theory or in fact.

(c) The Fact That the Agreement of "Merger and Consolidation" Was Entered Into and Carried Out After Congress Had Made Specific Provision for Non-recognition of Gain Upon Liquidation of Subsidiaries, Establishes That the Parties Intended to Continue the Business and Identity of the Subsidiary Instead of Liquidating It.

Under Section 112(b) (6) of the Revenue Act of 1936, approved June 22, 1936, and effective for fiscal years beginning after December 31, 1935, it was provided as follows:

"No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation."

Certain conditions were imposed which could easily have been met in this case. This provision was a continuation

in somewhat changed form of an amendment made to the Revenue Act of 1934 by Section 110 of the Revenue Act of 1935 approved on August 30, 1935.

Appellant suggests that the fact that Congress had provided for non-recognition of gain upon a liquidation indicates that a merger of a subsidiary into a parent company prior to the effective date of that provision is necessarily taxed as a liquidation. Quite the contrary. Congress intended to promote simplification of corporate structures and liquidation of subsidiaries (80 Cong. Record, p. 8799) and in many states a subsidiary could not be merged into its parent, particularly where there were minority interests. The amendment shows that Congress desired that there be no taxable realization *even where a parent company actually liquidated its subsidiary*. This carries no implication that the consequences flowing from an acquisition of assets in a statutory merger or consolidation under the prior law should be disregarded. It rather indicates the Congressional desire to extend to the actual liquidation of a subsidiary much the same tax consequences as resulted from a statutory merger or consolidation under the prior law from the standpoint of treating the assets transferred as continuing in corporate ownership under modified corporate form, without realization of gain or loss or change of basis (see Section 113(a)(15), Revenue Act of 1936).

III.

The Fact That Appellee Made No Formal Exchange of the Stock of Gennett Realty Company for Stock of the Continuing Company Does Not Change the Nature of the Transaction or Otherwise Give Rise to Taxable Income. Appellee Either in Legal Effect Received Stock of the Continuing Company in Exchange for Its Shares in Gennett Realty Company in a Non-recognition Exchange Under Section 112(b) (3), Or It Received Nothing for Such Shares.

The taxpayer contends that in legal effect under the California statutes it received stock in exchange for its shares in Gennett Realty Company and that pursuant to Section 112(b) (3) such exchange gave rise to no gain recognized for tax purposes. The fact that the formality of issuing the stock certificates was dispensed with does not convert what would otherwise have been an exchange into a distribution in liquidation but at most means that the taxpayer received nothing for such shares.

If the agreement of consolidation and merger in this case had provided that the appellee as the continuing company should issue shares of its stock to the stockholders of Gennett Realty Company, the exchange would fall squarely within Section 112(b) (3) and no gain would be recognized. Section 112(b)(3) provides:

“No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.”

Every requirement of this provision would be met as the transaction was admittedly a "reorganization," both corporations obviously were parties (Section 112(g) (2) and the exchange of stock for stock would have been made pursuant to the plan.

Where this formality has been complied with in reorganization cases, even where there was no statutory merger or consolidation, section 112(b)(3) has been held applicable. In *Helvering v. Winston Bros. Co.*, 76 F. (2d) 381 (8th C. C. A., 1935), Winston Bros. Co. owned 78% of the common stock, but none of the preferred stock, of Winston-Dear Company and pursuant to a plan acquired all the assets and assumed all the liabilities of Winston-Dear Company in exchange for 1,803 common shares and 1,116 preferred shares of its own stock. The preferred shares were distributed to the preferred stockholders of Winston-Dear Company share for share and the common shares were distributed pro rata to common stockholders. As one of the common stockholders, Winston Bros. Co. received back 1,232 shares of its own common stock, which it immediately retired. The Court held that Winston Bros. Co. did not receive any of the assets of Winston-Dear Company as a distribution in liquidation, but that like the other common stockholders it made an exchange of common stock of Winston-Dear Company for its own common stock pursuant to a plan of reorganization and that therefore no gain was to be recognized pursuant to Section 112(b) (3), Revenue Act of 1928.

If it is borne in mind that essentially there was in the present case merely a readjustment of corporate form with continuing interests in the same persons, that the transac-

tion would fall squarely within Section 112(b) (3), and that even if the transaction had been a liquidation of the subsidiary company, which it was not, congress in Section 110 of the Revenue Act of 1935 and Section 112(b) (6) of the Revenue Act of 1936 (applicable to the taxable years beginning on and after January 1, 1936) provided that no gain should be recognized in such a case, there can be little doubt that the courts would hold that Section 112(b) (3) was applicable if the formality of issuing additional shares to appellee in place of shares of Gennett Realty Company had taken place (*Commissioner v. Gilmore's Estate*, 130 F. (2d) 791 (2nd C. C. A., 1942); *Helvering v. Schoellkopf*, 100 F. (2d) 415 (2nd C. C. A., 1938)).

Appellee maintains that the substitutial effect of the transaction was exactly the same as if this formality had been complied with. The California statutes (Section 361) requires that the agreement of merger or consolidation shall prescribe

“the manner and basis of converting the shares of the constituent corporations into the shares of the consolidated or surviving corporation.” (See Appendix, p. 3.)

This requirement was complied with in the agreement by providing that the stock of Gennett Realty Company should be cancelled, the issuance of stock by the appellee in lieu thereof being dispensed with since the appellee was the only stockholder of the merged company. The stock of Gennett Realty Company obviously had value, the appellee clearly had the right to refuse to agree to the merger or consolidation without getting equivalent value in stock of the continuing company in lieu of its shares

of Gennett Realty Company and obviously consented that the issuance of this stock to it should be dispensed with because the result would merely be that it would hold some of its own shares of stock.

Appellant leans heavily upon the decision of the United States Board of Tax Appeals in the case of *Gutbro Holding Co. v. Commissioner*, 47 B. T. A. 374. For the reasons hereinbefore set forth we think the Board fell into error in the decision rendered and desire to state that the case is now on appeal to the Circuit Court of Appeals for the Second Circuit and set for argument on May 18, 1943.

Even if it should be thought that the omission of the mechanical step of exchanging stock for stock is a technicality which has significance, it is difficult to see how the agreement of the appellee not to receive this stock to which it was entitled increases its income or creates a gain or changes the nature of the transaction. The appellee, as *stockholder* of Gennett Realty Company, had no right to receive the assets of that company because it was not liquidated. Appellee's right to the assets arose solely because it was the continuing company in a statutory merger or consolidation. Appellee's sole right as holder of the stock of Gennett Realty Company was to receive stock in the continuing company. As shown above, if it had exercised this right and received this stock in exchange for the stock of Gennett Realty Company, no taxable gain would have resulted. Its receipt of property as stockholder, *i. e.*, what it received in exchange for its stock in Gennett Realty Company, certainly cannot be increased by its waiver of the right to receive stock in

itself as the continuing company. Since the taxpayer would realize no taxable gain on the receipt of stock itself, *a fortiori*, it realized no taxable gain by receiving nothing.

If appellee had taken the formal step of receiving shares of its own stock in exchange for the stock of Gennett Realty Company and then cancelling such stock, which in substance was what was done—that transaction gave rise to no taxable gain. What actually was done, as a matter of mechanics, was that this formal step was dispensed with, and the stock of Gennett Realty Company was merely cancelled, so that appellee received nothing for such stock.

In this merger and consolidation the appellee acted in two capacities. In the first place it was the continuing corporation in a statutory merger or consolidation and, as such, the assets of the merged company were combined with its assets by operation of law. As shown, the receipt of assets in this manner gives rise to no income, whether the transaction was technically a merger or a consolidation. In the second place, the appellee had a right to receive stock of the continuing company in place of its stock in the merged company. If it had received such stock, no taxable gain would have resulted because of Section 112(b)(3). Its taxable income certainly can be no greater merely because it did not go through the mechanical formality of receiving such stock and then cancelling it. In these capacities, whether considered separately or together, the petitioner realized no taxable income by reason of the receipt of the assets of Gennett Realty Company.

IV.

**The Corporate Entity of the Gennett Realty Company
Should be Disregarded.**

The lower Court because of the peculiar facts here involved held that the corporate entity of the Gennett Realty Company should be disregarded.

The only function of Gennett Realty Company was to hold legal title to two long-term leases which had been transferred to it by its sole stockholder, the appellee. The members of the Board of Directors of and its officers were persons employed by appellee and were actively engaged in the activities carried on by appellee. The Gennett Realty Company had no assets except the leases aforesaid. It did not have a bank account. It had no employees except its Officers and Directors. An employee of appellee did all the bookkeeping for Gennett Realty Company. All its debts were paid by the check of appellee. It had no office separate and apart from appellee. All rentals due under the leases transferred by appellee to Gennett Realty Company were collected by a trustee and the latter paid all interest due on its bonds and taxes due on the leased properties. In the sublease of properties transferred to Gennett Realty Company by appellee such leases were entered into by and on behalf of Gennett Realty Company and appellee as lessors.

It was by reason of these peculiar facts that the Court below held that appellee and Gennett Realty Company were so closely related in control, management and operation that the corporate entity of the wholly owned subsidiary should be disregarded.

The courts have frequently held that where a subsidiary corporation carries on no separate business and

does not operate independently of its parent, the two corporations should be considered as one. Whether or not a subsidiary should be treated as a separate entity from its parent depends upon the particular facts in each case and it is submitted that the facts in the case at bar are such as to justify if not require the disregard of the Gennett Realty Company as a separate entity.

Southern Pacific Company v. Lowe, 247 U. S. 330;

Inland Development Company v. Commissioner
(C. C. A. 10), 120 Fed. (2d) 986.

In *Inland Development Company v. Commissioner*, *supra*, the parent corporation caused certain oil leases to be transferred to subsidiary corporations of which the parent owned all the stock. The subsidiary corporations executed contracts for the drilling of oil wells on the leases so transferred. The costs of drilling and operation of the oil wells of the subsidiaries were paid by the parent and charged to the account of the subsidiaries. The income from the operations of the wells was received by the parent and credited to the account of the subsidiaries. In the year 1934, the Directors of one of the subsidiaries declared a dividend in the amount of \$53,125.00. An entry was made on the books of the subsidiary charging the earned surplus account and crediting the account of the parent with the amount of the dividend.

If the dividend of \$53,125.00 was income as such to the parent the latter would be classified as a personal holding company and subject to the surtax on the undistributed income. If the separate entity of the subsidiary was not recognized the amount received would not be classified as dividends and accordingly the parent

would not be classified as a personal holding company. The Court held that the separate entity of the subsidiary should be ignored, stating as follows:

“This taxpayer owned all of the stock of the several subsidiaries. Each subsidiary owned no assets whatever except the one lease transferred to it in the manner indicated. The subsidiary in each instance executed the contract under which the well was drilled but the taxpayer paid all costs and expenses of drilling and operation, and it received directly all of the income arising from the sale of royalty oil. The subsidiaries had no employees, the work on the leasehold estates being done by employees of the taxpayer, no offices, no books, except those kept by employees of the taxpayer in its offices, and no bank account. They did not buy, acquire, manage, control, sell, receive, or pay out anything. The taxpayer did all of that, without voice on the part of the subsidiaries. It is difficult to understand the purpose or motive for causing the subsidiaries to be formed and in operating the business in the manner outlined. Escape from liability, or limitation of liability was not the purpose, as the taxpayer bore the entire financial responsibility; and the Commissioner does not contend that either savings in taxes or fraud of any kind was the incentive. But whatever the underlying reason may have been, it is clear that the subsidiaries were nothing more than voiceless departments or instrumentalities of the taxpayer. Substance is paramount over form in the application of income tax laws.”

In the case of *United States v. Brager Building and Land Corp.* (C. C. A. 4), 124 F. (2d) 349, we find another case bearing closely upon the facts obtaining in

the case at bar. The Brager partnership prior to 1927 was engaged in carrying on a department store business in a store owned by the partnership. In 1927 the partnership sold the business to a third party. At the same time the partnership leased the store building owned by it to a third party for a period of twenty years. The store building was covered by a deed of trust under which certain amortization and interest payments were required to be made. The lease provided that the rental should be paid direct to the trustee and also provided for the payment of taxes and other fixed charges. In 1936 one of the two partners of the Brager partnership died. Under the terms of the partnership agreement the partnership did not terminate. The surviving partner on behalf of the partnership deeded the store property to a corporation in return for all the capital stock of said corporation for the purpose of providing an agency to hold legal title to the property and thus avoid certain complications. The partnership through its stock ownership retained complete control of the corporation. The corporation did not carry on any active business. The income involved was certain rentals paid by the tenant of the building direct to the trustee.

The Court held that the corporate entity should be ignored and that the income involved should be taxed to the partnership, stating as follows:

“The purely nominal character of the Brager Building and Land Corporation is established beyond question by the undisputed facts set out above. It was a convenient agency chosen by the owners to hold the record title of their property and nothing more. It performed no other function, it engaged in no other activity, and was at all times completely sub-

ject to the dominion and control of the Brager partnership. The income from the property was in our opinion income of the partnership.”

In *Helvering v. Security Savings & Commercial Bank*, 72 Fed. (2d) 874, we find a case on a state of facts much like the case at bar. There the Commissioner of Internal Revenue did not agree with the decision of the Board of Tax Appeals and the Circuit Court of Appeals for the Fourth Circuit reversed the decision of the Board. The Court held that a series of acts, corporate and otherwise, leading up to the purchase of the stock and business of the Central Savings Bank, did in effect constitute a single transaction, and where the sale of assets was made between two banks with identical officers and practically identical stockholders and the separate corporate entities became so merged that the line of demarcation was scarcely visible, then and in that event for tax purposes, where substance rather than form governs, the corporations should be treated as one in computing tax.

Appellant has cited a number of cases in which the courts have refused to disregard the separate entity of a subsidiary corporation. In each case, however, the subsidiary carried on activities or was availed of in such manner as to require that it be considered a separate entity. In *Texas Empire Pipe Line Company v. Commissioner*, 42 B. T. A. 368, affirmed 127 Fed. (2d) 220, the Court stated the subsidiary served two legitimate business purposes: (1) It acquired the power of eminent domain in Illinois, which power the parent corporation could not acquire; (2) It was availed of to reduce tax liability by the filing of a separate return for the year 1932. In *Burnett v. Riggs National Bank*, 57 Fed. (2d) 980, the

taxpayer acquired all of the stock of another bank and liquidated the subsidiary bank. In that case the subsidiary was a separate operating concern which carried on a business independent of that of parent. In that case the subsidiary was in no sense a mere department of the parent corporation. In *France v. Commissioner*, 88 Fed. (2d) 917, the facts were similar to the facts in *Burnett v. Riggs National Bank*, *supra*. In that case also the taxpayer acquired the stock of another subsidiary and later liquidated the subsidiary. In *Cerro de Pasco Copper Company v. United States*, 13 Fed. Supp. 633, there was also a mere liquidation of a wholly owned subsidiary corporation which had apparently carried on a business apart from its parent. In *Trenton Oil Company v. United States*, 41 Fed. Supp. 887, affirmed 122 F. (2d) 1023, the subsidiary filed separate income tax returns, maintained its corporate organization separate and distinct from the parent, had separate and distinct Board of Directors, officers and employees, held separate meetings, kept separate books and maintained a separate and distinct existence. Since in all the above cases the subsidiary corporation either operated a separate business or was availed of by the parent for business purposes, it is submitted that they do not support appellant's contention on the facts in the case at bar.

The stark facts are undisputed that the ownership of stock in the Gennett Realty Company by the appellee was not for the purpose of participating in the affairs of the Gennett Realty Company in a manner normal and usual with ordinary stockholders of a business corporation but was for the purpose of making the Gennett Realty Company a mere agent or instrumentality of the appellee. Following the statutory merger the appellee

was neither enriched nor impoverished. It had following the statutory merger just what it had before. The continuity of interest and control was completely preserved following the merger. This followed the pattern of what had been true from the inception of the Gennett Realty Company. The Gennett Realty Company had never in effect had or enjoyed a separate existence. It was a creature established by appellee and had only bare legal title to such assets as appellee chose to convey to it, its officers and directors were those of appellee, its place of business was that of appellee, the employees of appellee served as its employees, the appellee paid all its bills and absolutely controlled all business operations for profit or loss, the bank account and pocketbook of appellee was that of the subsidiary. In short it is respectfully submitted that for all practical purposes, the subsidiary was but a part of the appellee, acting merely as its agent and subject in all things to the proper direction and control of appellee, and by reason of the same the corporate entity of the subsidiary should be ignored.

If this case involved a situation where a loss was being claimed, the government would probably be the first to successfully contend that the corporate entity should be ignored in order that substance rather than form should prevail in taxation matters.

There is not the slightest hint or suggestion that tax avoidance or evasion occasioned the merger of the appellee with its subsidiary; neither was the government damaged from a tax standpoint. The appellee annually reports

whatever profit it derives from the leasing of the properties in question and should the appellee dispose of the leases in question, it will be required to report the resulting gain for tax purposes. To tax the appellee upon the gain which the government proposes is to indulge in the exaction of a tax before the happening of a taxable event and to levy a tax upon a fictitious gain.

The lower Court weighed the evidence adduced and its decision was based upon substantial evidence and was not clearly erroneous. The conditions under which the corporate entity may be disregarded or the corporation be regarded as the *alter ego* of the stockholders, necessarily varies according to the circumstances in each case, inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial Court.

The Supreme Court of the State of California recently, it is submitted, in a tax case set forth the rule of law applicable in cases of the disregard of corporate entity when it said in the case of *H. A. S. Loan Service, Inc. v. McColgan*, 21 A. C. 551:

“Plaintiff argues that in order to authorize the disregard of a corporate entity the evidence must be convincing and satisfactory and that a presumption of separate entity is present. However that may be, such rules are for the guidance of the trier of fact, and the rule on appeal is the same as in other cases; the conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence.

The same principle is pertinent in analogous instances involving the proof of fraud. (See 12 Cal. Jur. 834.)”

The United States Supreme Court has granted certiorari in two cases, *Commissioner v. Moline Properties, Inc.*, 131 Fed. (2d) 388 (5th Circuit), and *Interstate Transit Lines v. Commissioner*, 130 Fed. (2d) 136 (8th Circuit), which have been argued wherein was involved this general question and the decision of the Court will without doubt greatly clarify the question at issue.

Conclusion.

We respectfully urge that the judgment of the District Court be affirmed.

Respectfully submitted,

CLAUDE I. PARKER,

JOHN B. MILLIKEN,

Counsel for Appellee.

APPENDIX.

The Statutes Involved.

REVENUE ACT OF 1934

SEC. 111. DEFINITION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) COMPUTATION OF GAIN OR LOSS.—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) AMOUNT REALIZED.—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) RECOGNITION OF GAIN OR LOSS.—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) GENERAL RULE.—Upon the sale or exchange of property the entire amount of the gain or loss determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) EXCHANGES SOLELY IN KIND.—

* * * * *

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation [a party to a reorganization] are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation [a party to the reorganization.]

(4) SAME—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation [a party to a reorganization] exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(g) DEFINITION OF REORGANIZATION.—As used in this section and section 113—

(1) The term “reorganization” means (A) a statutory merger or consolidation, * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) BASIS (UNADJUSTED) OF PROPERTY.—The basis of property shall be the cost of such property; except that—

(7) TRANSFERS TO CORPORATION WHERE CONTROL OF PROPERTY REMAINS IN SAME PERSONS.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

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(c) DISTRIBUTIONS IN LIQUIDATION.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

DIVISION FIRST, PART IV, TITLE 1, CHAPTER XIII,
Section 361, of the CIVIL CODE OF CALIFORNIA

“361. MERGER AND CONSOLIDATION OF CORPORATIONS:
(1) APPROVAL BY BOARD. STATEMENTS IN AGREEMENT.
(2) SIGNATURES. (3) APPROVAL BY SHAREHOLDERS.
CERTIFICATE OF CONTENTS. (4) AMENDMENTS TO
AGREEMENT. (5) FILING OF AGREEMENT. (6) SUR-
PLUS. (7) SEPARATE EXISTENCE. CREDITORS' RIGHTS.

Any two or more corporations may be (a) merged into one of such constituent corporations, which is herein designated as ‘the surviving corporation,’ or (b) consolidated into a new corporation, which is herein designated as ‘the consolidated corporation,’ as follows:

(1) The board of directors of each corporation by resolution shall approve an agreement which shall set forth the terms and conditions of merger or consolidation, and the mode of carrying the same into effect, as well as the manner and basis of converting the shares of the constituent corporations into the shares of the consolidated or surviving corporation. The agreement may

also provide for the distribution of cash, property, or securities, in whole or in part, in lieu of shares, to shareholders of the constituent corporations or any class of them; provided, however, that upon such distribution of cash, property or securities, the liabilities of the consolidated or surviving corporation, including those derived by it from the constituent corporations, plus the amount of the stated capital of the consolidated or surviving corporation, shall not exceed the value of the assets of such consolidated or surviving corporation.

If the agreement is for a consolidation, it shall state the matters required to be stated in articles of incorporation and these statements shall be deemed to be the articles of the new or consolidated corporation.

If the agreement be for a merger, it shall state any matters with respect to which the articles of the surviving corporation are amended, and the articles shall be deemed to be amended accordingly upon the filing thereof with the secretary of state.

(2) The agreement shall be signed by the president or a vice-president and the secretary or an assistant secretary of each corporation, and acknowledged by the officers executing the same on behalf of their respective corporations.

(3) The agreement must be approved by the vote of the holders of not less than two-thirds of the issued and outstanding shares of each class, even though their right to vote be otherwise restricted or denied, of each of the constituent corporations, at a meeting duly called upon notice of the time, place and purpose thereof, duly given to each shareholder at least twenty days prior to the date

of such meeting. There shall be mailed with the notice of such meeting a statement of the general terms of the proposed agreement. Different series of the same class of shares shall not be construed to constitute different classes of shares for the purposes of voting by classes.

The approval of the shareholders may be given either before or after the approval of the agreement by the board of directors.

After such approval by the directors and shareholders has been given, the president or a vice president and the secretary or an assistant secretary of each corporation shall execute a certificate, which shall be verified by their oath and shall set forth:

- (a) The time and place of the meeting of the board of directors;
- (b) A copy of the resolution adopted thereat;
- (c) The vote in favor of such resolution;
- (d) The time and place of the meeting of the shareholders, and the total vote of each class of shares by which the agreement was approved;
- (e) The total number of outstanding shares of each class;
- (f) A statement of the mailing of the notice of the time, place and purpose of the meeting of the shareholders.

(4) Any amendment to the agreement may be adopted, and the agreement so amended may be approved, by like vote at such meeting of any of the constituent corporations, and if the agreement so amended be approved by like vote at such meeting and by the board of directors of each of the constituent corporations, the agreement so

amended shall be signed and acknowledged and shall have certified therewith the approval of the directors and of the shareholders in the same manner as provided for the original agreement, and shall then be considered the merging or consolidating agreement.

(5) The agreement so approved, executed and acknowledged and the certificates of its approval shall be filed with the secretary of state, and shall thereupon become effective, and the several parties thereto shall be one corporation. A copy of said agreement, certified by the secretary of state, shall be filed with the county clerks of the counties in which the principal office of each corporation is located and a copy of said agreement so certified shall be filed in the office of the county clerk of each county in which each corporation holds real property. A copy of such agreement or of a certified copy thereof certified by any official having custody thereof shall have the same force in evidence as the original, and, except as against the State, shall be conclusive evidence of the performance of all conditions precedent to such consolidation or merger, and the creation or existence of the consolidated or surviving corporation.

(6) The surplus appearing on the books of the constituent corporations, to the extent to which it is not capitalized by the issue of shares or otherwise, may be entered as earned or paid-in surplus, as the case may be, on the books of the consolidated or surviving corporation, and may thereafter be dealt with as such.

(7) Upon the merger or consolidation, as provided herein, the separate existence of the constituent corporations shall cease, except that of the surviving corporation in case of merger, and the consolidated or surviving

corporation shall succeed, without other transfer, to all the rights and property of each of the constituent corporations, and shall be subject to all the debts and liabilities of each, in the same manner as if the surviving or consolidated corporation had itself incurred them.

All rights of creditors and all liens upon the property of each of said former corporations shall be preserved unimpaired, limited in lien to the property affected by such liens immediately prior to the time of the consolidation or merger.

Any action or proceeding pending by or against any of such constituent corporations may be prosecuted to judgment, which shall bind the consolidated or the surviving corporation, or the consolidated or surviving corporation may be proceeded against or substituted in their place.

The directors of the corporation may, in their discretion, abandon such merger or consolidation subject to the rights of third parties under any contracts relating thereto, without further action or approval by the shareholders of the corporation, at any time before the merger or consolidation has been completed.—1933:1358.”

